Supreme Court, U.S.
FILED
FEB 21 1995
OFFICE OF THE CLERK

No. 94-6187

In The

Supreme Court of the United States

October Term, 1994

STEVEN KURT WITTE,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR PETITIONER

ROLAND E. DAHLIN II*
Federal Public Defender
Southern District of Texas

H. MICHAEL SOKOLOW
THOMAS S. BERG
Asst. Federal Public Defenders
440 Louisiana, Suite 310
P.O. Box 61508
Houston, TX 77208-1508
Telephone: (713) 238-9600

**Counsel of Record for Petitioner*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does a government prosecution and punishment for an offense violate the Double Jeopardy Clause if the offense already was included in relevant conduct for sentencing under the United States Sentencing Guidelines in a different and final prosecution?

LIST OF PARTIES

1. United States, in Cr. Nos. H-91-033 and H-92-207.
2. Steven Kurt Witte, in Cr. Nos. H-91-033 and H-92-207.
3. Ralph Christopher Neal (also known as Sam Richard Kelly), in Cr. No. H-91-033.
4. Tom Pokorny, in Cr. No. H-92-207.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATUTORY PROVISIONS INVOLVED 1

GUIDELINES PROVISIONS INVOLVED 1

STATEMENT 2

A. Offense Conduct 2

B. United States v. Witte and Kelly, Cr. No. H-91-033 5

C. United States v. Witte and Pokorny, Cr. No. H-92-207 9

SUMMARY OF ARGUMENT 11

ARGUMENT 14

I. THE UNITED STATES SENTENCING GUIDELINES MANDATE THE PUNISHMENT OF DRUG OFFENDERS FOR ALL REAL OFFENSES IN ONE PROCEEDING, AND MR. WITTE WAS PUNISHED FOR ALL REAL OFFENSES IN CASE NO. 91-033 14

TABLE OF CONTENTS – Continued

Page

A. The Sentencing Guidelines Implement Mandatory Modified Real Offense Sentencing to Effectuate the Goals of Uniformity and Proportionality and to Preclude the Danger of Charge Manipulation 14

B. The Relevant Conduct Provisions of the Guidelines Expressly Implement the Intent to Hold Offenders Accountable for All Charged and Uncharged Real Offenses in One Proceeding 18

C. The Guidelines and Commentary Regarding Drug Offenses Mandate the Punishment of Drug Offenders for All Real Offenses in One Proceeding and Protect Against Double Counting 20

D. Pursuant to the Guidelines, Mr. Witte Was Punished for All Real Offenses in Case No. 91-033 and Received a Procedurally Complete and Final Sentence for Those Offenses 23

II. THE DOUBLE JEOPARDY CLAUSE BARS PUNISHING MR. WITTE AGAIN FOR OFFENSES FOR WHICH HE ALREADY HAS BEEN PUNISHED 32

A. Congress Cannot Authorize the Imposition of Cumulative Punishment for One Offense in Two Criminal Proceedings, and the Fifth Circuit Thus Erred 32

TABLE OF CONTENTS – Continued

Page

B. Congress Has Incorporated the Guidelines into the Federal Criminal Code, and a Federal Court Cannot Ignore the Mandate of Congress and the Express Language of the Guidelines in Determining Whether a Defendant Is Being Twice Punished in Separate Proceedings for the Same Offenses 41

C. Punishing Mr. Witte Again in Case No. 92-207 Is Punishing Him Twice for the Same Offenses in Violation of the Double Jeopardy Clause 47

CONCLUSION 50

APPENDIX A A-1

APPENDIX B B-1

APPENDIX C C-1

APPENDIX D D-1

TABLE OF AUTHORITIES

Page

CASES

Albernaz v. United States, 450 U.S. 333 (1981) 34, 45

Ashe v. Swenson, 397 U.S. 436 (1970) 49

Ball v. United States, 470 U.S. 856 (1985)..... 49

Bartkus v. Illinois, 359 U.S. 121 (1959) 49

Blockburger v. United States, 284 U.S. 299 (1932)...46, 47

Brown v. Ohio, 432 U.S. 161 (1977) 32, 49

Burns v. United States, 501 U.S. 129 (1991).....14, 43

Chicago v. Environmental Defense Fund, 114 S. Ct. 1588 (1994)..... 37

Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S 102 (1980)..... 35

Crandon v. United States, 494 U.S. 152 (1990) 35, 38, 39, 40

Dep't of Revenue of Montana v. Kurth Ranch, 114 S. Ct. 1937 (1994)..... 33

Grafton v. United States, 206 U.S. 333 (1907) 33

Green v. United States, 355 U.S. 184 (1957)..... 49

Harris v. Oklahoma, 433 U.S. 682 (1977)..... 42

Hughey v. United States, 495 U.S. 411 (1990) 35

Kohler Co. v. Moen Inc., 12 F.3d 632 (7th Cir. 1993) 35

Mail Order Ass'n of America v. United States Postal Service, 986 F.2d 509 (D.C. Cir. 1993).....35, 40

Missouri v. Hunter, 459 U.S. 359 (1983) 32, 34

TABLE OF AUTHORITIES – Continued

Page

Mistretta v. United States, 488 U.S. 361 (1989) 15, 43

Moskal v. United States, 498 U.S. 103 (1990) 35

New York v. Ferber, 458 U.S. 747 (1982) 35

Nichols v. United States, 114 S. Ct. 1921 (1994) 30

Ohio v. Johnson, 467 U.S. 493 (1984) 45

Pearce v. North Carolina, 395 U.S. 711 (1969) 32

Ray v. United States, 481 U.S. 736 (1987) 49

Sekou v. Blackburn, 796 F.2d 108 (5th Cir. 1986) 30

Stinson v. United States, 113 S. Ct. 1913 (1993) 15, 35

United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943) 32

United States v. Colon, 905 F.2d 580 (2d Cir. 1990), *remanded for resentencing, sentence aff'd*, 961 F.2d 41 (2d Cir. 1992) 29

United States v. Davern, 970 F.2d 1490 (6th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1289 (1993) 43

United States v. Dixon, 113 S. Ct. 2849 (1993) .... *passim*

United States v. Duarte, 28 F.3d 47 (7th Cir. 1994) 31

United States v. Halper, 490 U.S. 435 (1989) 13, 32, 33, 34, 49

United States v. Jorn, 400 U.S. 470 (1971) 49

United States v. McCormick, 992 F.2d 437 (2d Cir. 1993) 39, 40

United States v. Olano, 113 S. Ct. 1770 (1993) 26

TABLE OF AUTHORITIES – Continued

Page

United States v. R.L.C., 112 S. Ct. 1329 (1992).....42, 43

United States v. Wittie, 25 F.3d 250 (5th Cir. 1994).....1, 10, 11, 27, 33, 34, 48

Whalen v. United States, 445 U.S. 684 (1980)..... 45-46

Williams v. Oklahoma, 358 U.S. 576 (1959).....28, 29, 30

Williams v. United States, 112 S. Ct. 1112 (1992)...15, 35

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V.....1, 41

STATUTES

18 U.S.C. § 2.....5, 10, 23

18 U.S.C. § 3553.....1, 15, 43

18 U.S.C. § 3624..... 15

21 U.S.C. § 841.....12, 21, 24, 27, 44

21 U.S.C. § 841(a)(1).....5, 23, 27

21 U.S.C. § 841(b)(1)(B).....5, 21

21 U.S.C. § 846.....5, 7, 21, 23, 27, 44, 45

21 U.S.C. § 952.....21, 44

21 U.S.C. § 952(a)..... 10

21 U.S.C. § 960.....12, 21, 24, 27, 44

21 U.S.C. § 960(b)(2)(B)..... 10

21 U.S.C. § 963..... 10, 21, 44, 45

28 U.S.C. § 991..... 15

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 994 ..... 15, 43

28 U.S.C. § 995(a) 15

28 U.S.C. § 1254(1) 1

SENTENCING GUIDELINES

U.S.S.G. Ch. 1, Pt. A.3 ..... 15, 22

U.S.S.G. Ch. 1, Pt. A.4 ..... 15, 16, 17, 24

U.S.S.G. § 1B1.1 ..... 18, 23, 36, 43

U.S.S.G. § 1B1.2 18

U.S.S.G. § 1B1.3 ..... *passim*

U.S.S.G. § 2A1.1 30

U.S.S.G. § 2A4.1 30

U.S.S.G. § 2D1.1 ..... *passim*

U.S.S.G. § 2D1.4 7

U.S.S.G. § 3C1.1 31

U.S.S.G. Ch. 3, Pt. D 22, 27

U.S.S.G. § 3D1.2 ..... *passim*

U.S.S.G. § 3D1.3 ..... 21, 24

U.S.S.G. § 4A1.2 31

U.S.S.G. Ch. 5, Pt. A – Sentencing Table 9, 18

U.S.S.G. § 5G1.2 ..... 24, 47

U.S.S.G. § 5G1.3 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

U.S.S.G. § 5K1.1 ..... 5, 8

U.S.S.G. App. A – Statutory Index 21

LAW REVIEW ARTICLES

Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises on Which They Rest*, 17 Hofstra L. Rev. 1 (1988) 15, 16, 17, 21, 22, 27

William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. Rev. 495 (1990) 18

David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403 (1993) 17, 18, 29

MISCELLANEOUS

Random House Dictionary of the English Language (2d ed. unabridged 1987) 36, 37

OPINIONS BELOW

The opinion of the court of appeals (J.A. 137) is reported at 25 F.3d 250 (5th Cir. 1994). The order of the district court (J.A. 130) is not reported.

JURISDICTION

The decision of the court of appeals (J.A. 137) was announced on June 23, 1994. The petition for certiorari was filed on September 21, 1994. Certiorari was granted on January 6, 1995. (J.A. 167). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution states:

> No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb.

U.S. Const. amend. V.

STATUTORY PROVISIONS INVOLVED

The text of 18 U.S.C. § 3553 is reprinted in the Appendix to this brief beginning at page A-1.

GUIDELINES PROVISIONS INVOLVED

The text of U.S.S.G. § 1B1.3 is reprinted in the Appendix to this brief beginning at page B-1.

The text of U.S.S.G. § 3D1.2 is reprinted in the Appendix to this brief beginning at page C-1.

The text of U.S.S.G. § 5G1.3 is reprinted in the Appendix to this brief beginning at page D-1.

STATEMENT

A. Offense Conduct[1]

In August 1989, an undercover agent of the Drug Enforcement Administration (DEA), Roger Norman, began negotiations with Dennis Mason in Tucson, Arizona, to import 1,000 kilograms of marijuana from Mexico to Houston, Texas. After Mr. Mason failed to provide the down payment, Agent Norman departed Tucson.

The DEA reactivated the case on June 9, 1990. On that date, Mr. Mason and Steven Kurt Witte, the Petitioner, met with federal undercover agents in Houston, Texas. The parties negotiated the transportation of fifteen tons of marijuana from Mexico to the United States. The undercover agents were to provide a DC-3 aircraft and a smaller airplane to transport the marijuana. Mr. Mason agreed to pay $165.00 for the transportation of each kilogram, and he and Mr. Witte agreed to provide $30,000 in expenses. Mr. Witte agreed to buy a horse trailer that could hold 2,000 pounds of marijuana. Later that day, Mr. Mason gave $30,000 to an undercover agent at Houston Intercontinental Airport prior to Mr. Mason's and a confidential informant's departure to Mexico via Tucson, Arizona.

On June 15, 1990, Mr. Mason and the confidential informant checked into a hotel in Tucson, Arizona, and later purchased a used automobile so that they could drive into Mexico. On June 20, 1990, they met Tom Pokorny in Tucson, and they all departed for Mexico.

On the morning of June 27, 1990, the DEA installed electronic surveillance equipment in a room at a hotel in

---

[1] The facts summarized in this section are found in paragraphs 5 through 27 of the Presentence Report in *United States v. Kurt Steven Wittie [sic]*, Cr. No. H-91-033, unless otherwise stated.

Houston, Texas. Mr. Pokorny met with Agent Norman and a confidential informant in the room later that morning and told Agent Norman that he and Mr. Mason wanted the agent to fly to Guatemala and transport cocaine by airplane into the United States. Mr. Pokorny offered to pay Agent Norman $1,000 for each kilogram of cocaine that he transported. They later telephoned Mr. Mason in Mexico, and Mr. Mason told Agent Norman that he would prefer that the cocaine in Guatemala and the marijuana in Mexico be transported at the same time. Mr. Pokorny and Agent Norman then made arrangements to fly to Guatemala, and Mr. Pokorny gave the agent $5,000.

Negotiations continued on July 15, 1990, when Agent Norman, the confidential informant, and other federal agents met with Mr. Pokorny, Mr. Mason, and Mr. Witte at a hotel in Houston, Texas. The parties agreed to proceed with the transportation of marijuana out of Mexico or the transportation of cocaine out of Guatemala, whichever came first. They also discussed that the Mexicans might add cocaine to the marijuana shipment from Mexico.

On July 23, 1990, Mr. Pokorny gave Agent Norman $100,000 in expense money for the transportation of 4,400 pounds of marijuana out of Oaxaca, Mexico. On July 27, 1990, Agent Norman learned the coordinates of the airstrip in Oaxaca. Mexican officials arrested Mr. Mason and four other individuals in Oaxaca, Mexico, on August 12, 1990, and seized 591 kilograms of cocaine. On August 13, 1990, federal agents and informants met with Mr. Witte and told him the pilots were unable to land because police had shown up at the airstrip.

Between August 13, 1990, and January 25, 1991, the DEA temporarily ceased contact with and surveillance of Mr. Witte and other suspects. On January 25, 1991, Agent

Norman paged Mr. Witte, and Mr. Witte telephoned him from Tucson, Arizona. Agent Norman offered to sell Mr. Witte 1,000 pounds of marijuana. Mr. Witte said he would call back the following Monday if he could raise the $50,000 down payment.

On January 28, 1991, Mr. Witte telephoned Agent Norman, stated that he had the down payment, and requested the return of his horse trailer so that it could be used as a load vehicle. Mr. Witte also said he would use a motor home as a second load vehicle. After two subsequent phone calls with Agent Norman, Mr. Witte met him in Houston, Texas, on February 7, 1991.

During the meeting on the evening of February 7, 1991, Mr. Witte told Agent Norman that he had only $25,000. Agent Norman agreed to give Mr. Witte the marijuana and to allow him three days to pay the balance. Later, in the early morning of February 8, 1991, Agent Norman telephoned other agents and directed them to come pick up the mobile home, which was to be used as the second load vehicle. The agents arrived at a restaurant, Mr. Witte showed them where the hidden compartments were located, and the agents drove the mobile home away.

Later in the morning of February 8, 1991, Agent Norman and another agent met Mr. Witte and Sam Kelly at their hotel. Mr. Witte introduced Mr. Kelly as the driver of the mobile home. The agents and Mr. Kelly went to a mall where the mobile home and horse trailer, which contained the marijuana, had been parked. The agents arrested Mr. Kelly when he took possession of the mobile home and horse trailer, and arrested Mr. Witte in the parking lot of his hotel.

B. United States v. Witte and Kelly, Cr. No. H-91-033[2]

On February 11, 1991, Mr. Witte and Mr. Kelly were charged by criminal complaint with conspiring to possess with intent to distribute more than 100 kilograms of marijuana on or about February 8, 1991, in violation of 21 U.S.C. §§ 841(a)(1), 846. (J.A. 3). The complaint alleged that the charges were based on the facts in the attached affidavit. *Id.* The affidavit alleged in summary form the offense conduct described above, *see supra* text, at 2-4, which had occurred from June 9, 1990, through February 8, 1991. (J.A. 4-8).

On March 4, 1991, Mr. Witte and Mr. Kelly were charged in a two-count indictment with conspiring to possess with intent to distribute in excess of 100 kilograms of marijuana and with attempting to possess with intent to distribute in excess of 100 kilograms of marijuana, in violation of 18 U.S.C. § 2, and 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), 846. (J.A. 9-10). On February 21, 1992, Mr. Witte entered a plea of guilty to the attempted possession charge, Count Two of the indictment. (J.A. 39, 43).

The guilty plea was entered pursuant to a plea agreement in which Mr. Witte promised to cooperate "with the Government by providing truthful and complete information concerning this and all other offenses about which [he] might be questioned by law enforcement agents" and by testifying if called upon to do so. (J.A. 14). The Government agreed to move for a downward departure under U.S.S.G. § 5K1.1 if Mr. Witte provided substantial assistance, (J.A. 14), and to recommend a three-year cap if Mr. Witte assisted in locating Mr. Pokorny. (J.A. 21, 23).

---

[2] Hereinafter referred to as "Case No. 91-033." "Wittie" is corrected to "Witte."

The Government further agreed to move to dismiss Count One at sentencing. (J.A. 14, 34).

The parties stipulated that the amount of marijuana possessed by Mr. Witte was 375 pounds. (J.A. 17, 41, 59). At the plea proceeding, defense counsel expressed his view that the presentence report should not include as relevant conduct the cocaine in Oaxaca, Mexico, and related matters since the Government had contended all along that the "previous case" had nothing to do with this case. (J.A. 18). The court responded that it was not bound by "what the probation officer finds out," that the Government could agree to a "downward departure to the amount actually possessed," and that, if it sentenced Mr. Witte on the basis of "350 pounds" rather than "1,000 pounds," the Government could appeal. (J.A. 18-19). At the end of the proceeding, the district court allowed Mr. Witte to remain free on bond pending sentencing. (J.A. 43).

Prior to sentencing, a United States Probation Officer prepared a presentence report ("PSR"). Under the section entitled "Offense Conduct," the PSR recited all of the activities of Mr. Pokorny, Mr. Mason, and Mr. Witte concerning marijuana and cocaine from August 18, 1989, through February 8, 1991. *See PSR*, paras. 5-27; *see also supra* text, at 2-4. At the end of the section, the PSR concluded, among other things, that the July 15, 1990, meeting between federal agents and Mr. Pokorny, Mr. Mason, and Mr. Witte "set out the infrastructure of the conspiracy" between them, that they were cohesive as a group, and that the federal agents "temporarily ceased contact with [Mr.] Witte until January 25, 1990 [*sic*], at which time Special Agent Norman and [Mr.] Witte resumed business." *PSR*, paras. 28-30. The addendum to the PSR further concluded that Mr. Witte "is held accountable for the entire drug amount involved in the

jointly undertaken criminal activities" of himself, Mr. Pokorny, Mr. Mason, and Mr. Kelly, because these activities were reasonably foreseeable to Mr. Witte, were jointly undertaken by him, and were within the scope of his agreement. *Addendum to the PSR*, at 1 (citing U.S.S.G. § 1B1.3).

Under the section entitled "Offense Level Computation," the PSR first calculated the base offense level for Mr. Witte's offense, which was described in the following manner:

> The guideline for 21 USC 846 is found in U.S.S.G. § 2D1.4 which refers to 2D1.1(a)(3). The *instant offense* involved aiding and abetting in an attempt to possess with intent to deliver 15 tons of marijuana from Mexico, 500 kilograms of cocaine from Guatemala, 591 kilograms of cocaine from Mexico and a marijuana reverse buy involving 1,000 pounds of marijuana in Houston, Texas.

PSR, para. 35 (emphasis added). The PSR next converted the amount of cocaine into an equivalent of marijuana, arrived at an aggregate drug amount of 232,261.6 kilograms of marijuana, and concluded that Mr. Witte's base offense level was 40. *PSR*, para. 35.

To the base offense level, the PSR added a two-level adjustment for Mr. Witte's role in "the 1,000-pound marijuana delivery and the 15-ton marijuana negotiations." *PSR*, para. 37. It denied him a two-level downward adjustment for acceptance of responsibility because he acknowledged his involvement "in the *instant offense* for events that occurred only after January 25, 1991." *PSR*, para. 41 (emphasis added). Based on these calculations, the PSR concluded that Mr. Witte's total offense level was 42. Because Mr. Witte's criminal history category was I, *PSR*, para. 45, his imprisonment range, according to the PSR, was 360 months to life. *PSR*, para. 69.

At sentencing on July 10, 1992, both Mr. Witte and the Government asked the court for a two-level reduction in the total offense level for acceptance of responsibility. (J.A. 54-55, 59-60). Both parties also objected to the aggregate drug amount in paragraph 35 of the PSR on the ground that the case involved only negotiations on 1,000 pounds of marijuana and the delivery of 375 pounds of marijuana to the defendants. (J.A. 54-57, 60-62, 63-65). The district court well understood the import of the arguments under the Double Jeopardy Clause as it addressed Mr. Witte:

> Do you know that both your lawyer and the Government's lawyer are trying to convince me to disregard all of the talk about anything except this particular little marijuana deal, but for different reasons? Your lawyer wants me to disregard it so that I'll reduce your sentence in this case. The Government's lawyer wants me to disregard it so he can indict you in another case if he wants to.

(J.A. 62).

Prior to sentencing, the Government moved the court for a downward departure under U.S.S.G. § 5K1.1 on the basis of Mr. Witte's substantial assistance. (J.A. 57-58). The Government stated that the motion had nothing to do with other matters that were pending or "may be pending in this or any other jurisdiction" and that it only had "to do with this particular case." (J.A. 57-61). The district court granted the Government's motion for a downward departure. (J.A. 58).

Ultimately, the court granted Mr. Witte a two-level reduction for acceptance of responsibility, which reduced his total offense level to 40 and his imprisonment range

to 292 to 365 months. (J.A. 68).[3] The court then sentenced Mr. Witte to serve 144 months in custody and imposed a five-year term of supervised release and a fifty-dollar special assessment. (J.A. 68-69, 74-81). Noting the thorough job of the probation officer and the mandate of the Sentencing Reform Act, the court adopted the factual statements and the relevant conduct in the PSR. (J.A. 68-69). The district court dismissed Count One of the indictment. (J.A. 69).

Mr. Witte timely filed a notice of appeal on July 10, 1992, but his appeal was dismissed on December 16, 1992, for his failure to file a brief. (J.A. 2).

C. United States v. Witte and Pokorny, Cr. No. H-92-207[4]

Although Mr. Pokorny had remained at large since August 12, 1990, *see PSR*, paras. 17, 32, he was apprehended in June of 1992, prior to Mr. Witte's sentencing in Case No. 91-033. *See* Order of Detention Pending Trial, at 3, *United States v. Pokorny*, Cr. No. H-92-207 (S.D. Tex.

---

[3] For 375 pounds (approximately 170 kilograms) of marijuana, the base offense level would have been 26. *See* U.S.S.G. § 2D1.1(c)(7) (100 to 400 kilograms of marijuana). For 1,000 pounds (approximately 455 kilograms) of marijuana, the base offense level would have been 28. *See id.* § 2D1.1(c)(6) (400 to 700 kilograms of marijuana). Because the two-level reduction for acceptance of responsibility and the two-level addition for role in the offense cancel out, the total offense level in this case, as urged by the parties, would have been 26 or 28. Prior to the court's departure downward, therefore, the imprisonment range would have been 63 to 78 months (level 26) or 78 to 97 months (level 28). *See* U.S.S.G. Ch. 5, Pt. A – Sentencing Table (criminal history category I, offense levels 26 and 28).

[4] Hereinafter referred to as "Case No. 92-207." "Wittie" is corrected to "Witte."

filed Nov. 23, 1992) (docket entry 12). On September 2, 1992, Mr. Witte and Mr. Pokorny were charged in a two-count indictment with conspiring to import in excess of five kilograms of cocaine and attempting to import in excess of five kilograms of cocaine from August 18, 1989, through August 15, 1990, in violation of 18 U.S.C. § 2, and 21 U.S.C. §§ 952(a), 960(b)(2)(B), 963. (J.A. 82-83). The case was assigned to a different district judge of the same court. *Compare* (J.A. 45), *with* (J.A. 84).

On February 22, 1992, the district court held a hearing on Mr. Witte's motion to dismiss the indictment for violation of the Double Jeopardy Clause and breach of the plea agreement entered into in Case No. 91-033. (J.A. 84-129). The Government's description of the cocaine offenses charged in Case No. 92-207 was virtually identical to the offense conduct that had been included in Mr. Witte's base offense level in Case No. 91-033. *Compare PSR*, paras. 5-27, 35, *with* (J.A. 85-88). Subsequent to the hearing, the district court entered an order dismissing the indictment because it violated the Double Jeopardy Clause's protection against multiple punishments for the same offense. (J.A. 130-36).

The Government appealed the ruling, and the United States Court of Appeals for the Fifth Circuit reversed the order of the district court on June 23, 1994. *United States v. Wittie*, 25 F.3d 250, 254-62, 263 (5th Cir. 1994); (J.A. 143-62, 166). The Fifth Circuit held, *inter alia*, that the inclusion of the cocaine in relevant conduct in Case No. 91-033, even if considered punishment under the Double Jeopardy Clause, did not bar double and additional punishment of Mr. Witte in Case No. 92-207 because Congress had

authorized this result under U.S.S.G. § 5G1.3(b).[5] *Wittie*, 25 F.3d at 258-61; (J.A. 154-62).

This Court granted certiorari on January 6, 1995. (J.A. 167).

SUMMARY OF ARGUMENT

I. The United States Sentencing Guidelines mandate the punishment of drug offenders for all real offenses in one proceeding, and Mr. Witte was punished for all real offenses in Case No. 91-033.

A. In carrying out the mandate of Congress, the United States Sentencing Commission adopted modified real offense sentencing, which punishes a defendant for all real offenses. The Commission crafted the guidelines to eliminate unfair treatment from count manipulation and to punish the total harm when offenses involve fungible items such as separate drug transactions. The federal guidelines' version of real offense sentencing is unprecedented in prior state or federal practice, especially because it is mandatory and punishes alleged related offenses in addition to the offense charged.

B. The relevant conduct provisions of the guidelines expressly hold offenders accountable for all charged and uncharged real offenses. Section 1B1.3 and its commentary define "offense" as "the offense of conviction and all relevant conduct," and specifically include in relevant

---

[5] According to the Fifth Circuit's example, if Mr. Witte had served 30 months of his sentence in Case No. 91-033 and were sentenced to 292 months in custody in Case No. 92-207, the district court would subtract the 30 months from the 292 months and impose a sentence of 262 months of imprisonment pursuant to U.S.S.G. § 5G1.3(b). *See Wittie*, 25 F.3d at 261; (J.A. 162). Accordingly, the Fifth Circuit concluded that the district court could impose an additional 118 months (262-144) of imprisonment in Case No. 92-207.

conduct all acts and omissions aided and abetted by the defendant and all jointly undertaken criminal activity, "whether or not charged as a conspiracy."

C. The guidelines employ a strong version of real offense sentencing for drug offenses and significantly minimize any element of charge offense sentencing. Section 3D1.2(d) requires that drug offenses be grouped based on the total quantity of drugs involved in all real offenses. This punishes the offender as if there were only one count. Section 2D1.1 groups the total quantity of drugs to determine the base offense level. The commentary also specifically notes that violations of 21 U.S.C. §§ 841 and 960 receive identical punishment. The guidelines' punishment of drug offenders for all real offenses in one proceeding promotes uniformity in sentencing and efficient judicial administration.

D. Pursuant to the real offense sentencing structure of the guidelines, Mr. Witte was punished for all real offenses in Case No. 91-033 and received a procedurally complete and final sentence for those offenses. The base offense level was pegged to a drug conspiracy offense and thus the calculation of punishment did not even begin with the offense to which he pleaded guilty. All real offenses were grouped based on the total amount of drugs, and the court sentenced Mr. Witte for those offenses because they were jointly undertaken and were part of the same course of conduct. Mr. Witte would have faced no different base offense level or range of punishment even if he had pleaded guilty to all real offenses. Thus, the operation of the guidelines at Mr. Witte's sentencing leaves no room for the argument that he was not punished for all real offenses or that his punishment was merely "enhanced" by them.

II. The Double Jeopardy Clause bars punishing Mr. Witte again for the offenses for which he already has been punished.

A. When multiple punishments are imposed in a single proceeding, the Double Jeopardy Clause ensures that a court does not exceed its legislative authorization. When the Government seeks to impose additional punishment in a second proceeding, however, the Double Jeopardy Clause bars such a result. *See United States v. Halper*, 490 U.S. 435, 451 n.10 (1989). The Fifth Circuit assumed that both prosecutions involved the "same offense" and that Mr. Witte previously had been punished for the cocaine offenses. Misinterpreting this Court's single-proceeding precedent, the Fifth Circuit ruled that Mr. Witte could be punished again for those offenses in a second proceeding because that was authorized under U.S.S.G. § 5G1.3(b). Because the posture of the case in the court below embodied the assumption that both prosecutions involved the "same offense," the Fifth Circuit's conclusion clearly was constitutionally wrong under *Halper*. The Fifth Circuit's misinterpretation of precedent also caused it to read section 5G1.3(b) as authorizing violations of the Double Jeopardy Clause.

B. Congress has incorporated the guidelines into the federal criminal code, and a federal court cannot ignore that mandate of Congress and the express language of the guidelines in determining whether a defendant is being twice punished in separate proceedings for the same offense. Just as the trial court's order of release in *United States v. Dixon*, 113 S. Ct. 2849 (1993), incorporated the entire criminal code, so too has Congress incorporated the guidelines into each provision of the federal criminal code. Thus, to determine whether the offenses punished in two separate proceedings are the same, a

federal court must look to the offenses punished pursuant to the guidelines. If the offenses are the same in both proceedings, the Double Jeopardy Clause bars additional punishment.

C. Punishing Mr. Witte again in Case No. 92-207 is punishing him twice for the same offenses in violation of the Double Jeopardy Clause. The base offense level and the relevant conduct will necessarily be the same as in the prior prosecution, and Mr. Witte will face an additional 191 months in prison. Mr. Witte will be punished for the same conspiracy and for the same attempted importation and possession of cocaine and marijuana. The Double Jeopardy Clause, therefore, prohibits any additional punishment.

ARGUMENT

I. THE UNITED STATES SENTENCING GUIDELINES MANDATE THE PUNISHMENT OF DRUG OFFENDERS FOR ALL REAL OFFENSES IN ONE PROCEEDING, AND MR. WITTE WAS PUNISHED FOR ALL REAL OFFENSES IN CASE NO. 91-033.

A. The Sentencing Guidelines Implement Mandatory Modified Real Offense Sentencing to Effectuate the Goals of Uniformity and Proportionality and to Preclude the Danger of Charge Manipulation.

"The Sentencing Reform Act of 1984 revolutionized the manner in which district courts sentence persons convicted of federal crimes." *Burns v. United States*, 501 U.S. 129, 132 (1991). Prior to the implementation of the United States Sentencing Guidelines,[6] "[s]tatutes specified the penalties for crimes but nearly always gave the

---

[6] United States Sentencing Comm'n, *Guidelines Manual* (Nov. 1994) [hereinafter referred to as "the guidelines" and cited as "U.S.S.G."].

sentencing judge wide discretion to decide" the nature and length of the punishment imposed. *Mistretta v. United States*, 488 U.S. 361, 363 (1989).

The Sentencing Reform Act mandated a number of reforms in order to change this approach, including: (1) it made all sentences determinate; and (2) it made "the Sentencing Commission's guidelines binding on the courts, although it preserved some discretion for the judge to depart from the guideline applicable in a particular case." *Id.* at 367-68 (citing 18 U.S.C. §§ 3553(a), (b), (c), 3624(a), (b), and 28 U.S.C. §§ 991, 994, 995(a)).[7]

Congress sought to achieve three objectives in enacting the Sentencing Reform Act: (1) honesty in sentencing, through the imposition of determinate sentences; (2) uniformity in sentencing "by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders;" and (3) "proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity." U.S.S.G. Ch. 1, Pt. A.3; *see also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises on Which They Rest*, 17 Hofstra L. Rev. 1, 4-6 (1988) (discussing purposes of Congress).

In drafting the guidelines, the Sentencing Commission was required to resolve "a host of important policy questions" involving competing considerations. U.S.S.G. Ch. 1, Pt. A.4; *see also* Breyer, *supra*, at 8-31 (discussing six kinds of compromises forced upon the Commission). One

---

[7] In fact, the guidelines and their attendant commentary and policy statements also are binding and authoritative. *See Stinson v. United States*, 113 S. Ct. 1913, 1919 (1993) (amended commentary binding); *Williams v. United States*, 112 S. Ct. 1112, 1119 (1992) (policy statements authoritative guide as to applicable guideline).

key policy question was the choice between real offense sentencing and charge offense sentencing:

> One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ("real offense" sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted ("charge offense" sentencing).

U.S.S.G. Ch. 1, Pt. A.4(a); *see also* Breyer, *supra*, at 8-12 (discussing the compromise between these competing rationales).

The "Commission initially sought to develop a pure real offense system," but subsequently moved closer to a charge offense system, while retaining "a significant number of real offense elements." U.S.S.G. Ch. 1, Pt. A.4(a). The Sentencing Guidelines, therefore, are a charge offense system to the extent that they look "to the offense *charged* to secure the 'base offense level.' " Breyer, *supra*, at 11-12 (footnote omitted; emphasis in original). The Commission, however, wrote "guidelines that are descriptive of generic conduct rather than guidelines that track pure statutory language" because of "the hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law." U.S.S.G. Ch. 1, Pt. A.4(a).

As the Sentencing Commission expressly recognized, however, a charge offense system has its own drawbacks that call for special protections:

> One of the most important is the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment. . . . [T]he Commission has written its rules for the treatment of multicount

> convictions with an eye toward eliminating unfair treatment that might flow from count manipulation. For example, the guidelines treat a three-count indictment, each count of which charges sale of 100 grams of heroin . . . , the same as a single-count indictment charging the sale of 300 grams of heroin . . . .

Id. This same concern about charge manipulation also is reflected in the Commission's attempt to grapple with the issue of multi-count convictions in which conduct involves the same harm or "fungible items" such as "separate drug transactions." *Id.* Pt. A.4(e). When the conduct involves fungible items, "the amounts are added and the guidelines apply to the total amount." *Id.*

The modified real offense system adopted by the Sentencing Commission distinguishes the guidelines from prior federal and state sentencing practices. "The Sentencing Commission's decision to employ a strong version of mandatory real-offense sentencing, particularly its inclusion of alleged related-offense sentencing, is unprecedented in the history of American sentencing systems." David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403, 404-05 (1993) (footnote omitted); *see also id.* at 419. Although a judge in the former federal system exercised the discretion to consider real-offense elements in sentencing, a judge "was not *required* to take into account any real-offense behavior, as would be the case with binding sentencing guidelines incorporating real-offense sentencing." *Id.* at 418 (emphasis in original). Real offense sentencing under the old federal system was sporadic and unpredictable, and the weight given to real offense elements generally was hidden. *Id.* at 418-19. These features of the old system motivated the promulgation of the guidelines. *See id.* at 419; *see also* Breyer, *supra*,

at 11. Thus, the guidelines' version of real offense sentencing promotes uniformity and proportionality and guards against count manipulation in sentencing, but it also "is a radical measure," particularly because it incorporates mandatory sentencing for alleged related offenses. Yellen, *supra*, at 419.

B. The Relevant Conduct Provisions of the Guidelines Expressly Implement the Intent to Hold Offenders Accountable for All Charged and Uncharged Real Offenses in One Proceeding.

The language and directives of the guidelines themselves specifically implement a strong version of real offense sentencing. In general, the guidelines direct a sentencing judge to take the following steps in imposing a federal sentence: (1) look up the statute of conviction in the statutory index; (2) find the base offense level; (3) add specific offense characteristics; (4) add any adjustments from Chapter 3; (5) calculate a criminal history score using Chapter 4; (6) look at the Sentencing Table in Chapter 5 to determine the sentence; and (7) impose a guideline sentence, or, if the court finds unusual factors, depart and impose a non-guideline sentence. Breyer, *supra*, at 6-7; *see also* U.S.S.G. § 1B1.1. The commentary to section 1B1.1 expressly states that "*[o]ffense* means the offense of conviction and *all relevant conduct* under § 1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context." U.S.S.G. § 1B1.1, comment. (n.1(l)) (emphasis added). Section 1B1.2 directs: "[a]fter determining the appropriate offense guideline section . . . , determine the applicable guideline range in accordance with § 1B1.3 (Relevant Conduct)." *Id.* § 1B1.2(b). The relevant conduct section, therefore, "forms the cornerstone of the federal sentencing guideline system." William W. Wilkins, Jr. & John R. Steer,

Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C. L. Rev. 495, 496 (1990).

Section 1B1.3 requires, in pertinent part, that:

> (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:
>
> (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, *whether or not charged as a conspiracy*), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,
>
> that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;
>
> (2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction.

U.S.S.G. § 1B1.3(a)(1)-(2) (emphasis added).

Thus, the Sentencing Guidelines expressly require that a defendant is to be held accountable for all jointly

undertaken criminal activity "whether or not charged as a conspiracy." *Id.* § 1B1.3(a)(1)(B); *see also id.* comment. (n.2). With respect to offenses involving controlled substances, the guidelines also direct a sentencing judge to hold the defendant accountable for all quantities of contraband with which he was directly involved and, in the case of jointly undertaken criminal activity, "all reasonably foreseeable quantities that were within the scope of the criminal activity that he jointly undertook." *Id.* comment. (n.2) (italics deleted). Offenses that would require grouping under the multiple-counts provisions of section 3D1.2(d) are treated in the same manner, and, again, the defendant need not "have been convicted of multiple counts." *Id.* comment. (n.3) (italics deleted).

C. The Guidelines and Commentary Regarding Drug Offenses Mandate the Punishment of Drug Offenders for All Real Offenses in One Proceeding and Protect Against Double Counting.

Thus, the Sentencing Commission through the relevant conduct provisions evinced an express desire to hold defendants accountable for their real offenses in a federal criminal case regardless of whether those offenses were charged or uncharged. The Commission's intent is especially pervasive in its treatment of drug offenses. Section 3D1.2 of the guidelines requires that all counts "shall be grouped" when "the offense level is determined largely on the basis of the total amount of . . . the quantity of substance involved, . . . or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior." U.S.S.G. § 3D1.2(d). Subsection (d) specifically requires the grouping of offenses covered by section 2D1.1 and other drug offense guidelines. *Id.* § 3D1.2(d). The commentary also

makes clear that drug offenses are to be grouped and that the sentence is to be based on the total quantity. *See* U.S.S.G. § 3D1.2, comment. (n.4, ex.4), (n.6 & ex.5); *see also id.* § 3D1.3(b) & comment. (n.3). The grouping rules in drug cases are designed "to avoid double counting." *Id.* § 3D1.2, comment. (n.4, ex.4). In essence, they "punish the offender as if there were a single count involving the total amount." Breyer, *supra*, at 27.

The Statutory Index of the guidelines further reflects the Sentencing Commission's intent to hold defendants in federal drug cases accountable in one proceeding for their real offenses regardless of the charged offenses. For example, the statutes prohibiting possession with intent to distribute a controlled substance and importation of a controlled substance are assigned the same guideline, section 2D1.1. *See* U.S.S.G. App. A – Statutory Index (21 U.S.C. §§ 841(a), 841(b)(1)-(3), 952, 960(b)). Similarly, the statutes prohibiting conspiracy to possess with intent to distribute a controlled substance and conspiracy to import a controlled substance are assigned the same guidelines, including section 2D1.1. *See id.* (21 U.S.C. §§ 846, 963).

Finally, section 2D1.1 uses the aggregate quantity of drugs to assign a *base offense* level under the guidelines. *See* U.S.S.G. § 2D1.1(c) (Drug Quantity Table); *see also id.* comment. (n.6). In the commentary, the Commission expressly notes that "[o]ffenses under 21 U.S.C. §§ 841 and 960 receive identical punishment based upon the quantity of the controlled substance involved, the defendant's criminal history, and whether death or serious bodily injury resulted from the offense." *Id.* comment. (backg'd.). Especially with regard to drug offenses, the guidelines significantly minimize, if they do not eliminate, charge offense sentencing.

The purposes, structure, and language of the guidelines, therefore, mandate the punishment of drug offenders for all real offenses in one sentencing proceeding, whether those offenses are charged or uncharged. This treatment of drug offenses comprises an elegant execution of the Sentencing Commission's objectives "to provide incremental punishment for significant criminal conduct," but not in a strictly proportionate manner, U.S.S.G. Ch. 3, Pt. D, intro. comment.; *see also* Breyer, *supra*, at 27, "to limit the significance of the formal charging decision and to prevent multiple punishment for substantially identical offense conduct." U.S.S.G. Ch.3, Pt. D, intro. comment.

The guidelines' treatment of drug offenses also embodies the sound policies of efficient judicial administration and fairness. For example, in a case similar to Mr. Witte's, in which the guideline imprisonment range is 292 to 365 months but there is no motion for a departure downward, a prosecutor could obtain at least four sentencings by four judges in the same federal courthouse for all of the same relevant conduct, were it not for the guidelines' strong real offense approach. *See PSR*, para. 35 (two marijuana transactions and two cocaine transactions). The prosecutor could obtain ever increasing punishment within the same guideline range (*e.g.*, 292, 310, 340, and 365 months) from four federal judges until he or she "rang the bell" at the top of the guideline range. In addition, four appeals and four petitions for writ of certiorari might well follow. This practice under a federal guideline system would beleaguer federal courthouses throughout the land and subvert the fairness of the sentencing process. It would fail not only to decrease disparity in sentencing similar offenders who had committed similar offenses, *see* U.S.S.G. Ch. 1, Pt. A.3, but it also would create disparity in the sentencing of just one

offender for all of the same offenses.[8] To avoid such consequences, the guidelines mandate the punishment of drug offenders for all real offenses in one proceeding.

D. Pursuant to the Guidelines, Mr. Witte Was Punished for All Real Offenses in Case No. 91-033 and Received a Procedurally Complete and Final Sentence for Those Offenses.

The PSR in Case No. 91-033 fulfilled all of the procedural steps required by the guidelines, except for the imposition of sentence. *See* U.S.S.G. § 1B1.1; *see also supra* text, at 7-8; *PSR*, paras. 1-69. It concluded that there was a "cohesive" conspiracy between Mr. Pokorny, Mr. Mason, and Mr. Witte, *PSR*, paras. 28-29, and that federal agents "temporarily ceased contact with [Mr.] Witt[e] until January 25, 199[1], at which time Special Agent Norman and [Mr.] Witt[e] resumed business." *PSR*, para. 30. Based on the facts and these conclusions, the PSR calculated the *base offense level* for *"the instant offense"* by using the guideline for 21 U.S.C. § 846, which proscribes drug conspiracies, even though Mr. Witte had entered a plea of guilty to Count Two of the indictment, which charged aiding and abetting and attempting to possess with intent to distribute a controlled substance, in violation of 18 U.S.C. § 2, and 21 U.S.C. § 841(a)(1). *Compare PSR*, para.

---

[8] Worse yet would be the case in which the drug offenses and sentencings involved drug-trafficking negotiations only. *See* U.S.S.G. § 2D1.1, comment. (n.12) (amount under negotiation is used unless the court finds the defendant did not intend to or could not produce it). In such a case, a prosecutor via charging decisions could seek significant additional sentences for the same real offenses in multiple proceedings by pursuing ever increasing rulings from different judges on the amounts under negotiation and/or the amounts that the defendant intended to or could produce.

35, *with* (J.A. 9-10) (indictment); (J.A. 14) (plea agreement); and (J.A. 43) (plea of guilty to Count Two). The PSR aggregated all drug quantities for all offenses and arrived at a base offense level of 40 on the ground that Mr. Witte should be "held accountable for the entire drug amount involved in the jointly undertaken activities." *Addendum to the PSR*, at 1; *PSR*, para. 35. This conclusion rested on U.S.S.G. § 1B1.3. *Addendum to the PSR*, at 1.

The grouping of all drug offenses under the base offense level calculation was entirely consistent with the Sentencing Commission's intent to punish offenses involving the same harm or "fungible items," such as "separate drug transactions," to eliminate unfair treatment from count manipulation. U.S.S.G. Ch. 1, Pt. A.4(a), (e). In fact, section 3D1.2 expressly requires the grouping of drug offenses and other offenses involving "substantially the same harm." U.S.S.G. § 3D1.2; *see also id.* § 3D1.2(d).

In addition, the base offense level in Case No. 91-033 would have been 40 even if Mr. Witte had been charged with and pleaded guilty to four counts of conspiring to import, importing, conspiring to possess with intent to distribute, and possessing with intent to distribute controlled substances. *See* U.S.S.G. § 2D1.1(a)(3), (c) (drug quantity determines base offense level); *id.* § 2D1.1, comment. (n.6) (quantities are to be added); *id.* § 2D1.1, comment. (backg'd.) ("Offenses under 21 U.S.C. §§ 841 and 960 receive identical punishment") (italics deleted); *id.* §§ 3D1.2, 3D1.3 (group multiple counts); *id.* § 5G1.2(b), (c) (impose total punishment on each count and run concurrently). Thus, with the rulings made by the trial court at sentencing, (J.A. 68-69), the imprisonment range still would have been 292 to 365 months, whether Mr. Witte pleaded guilty to all of the offenses or just one of them.

At sentencing, both Mr. Witte and the Government objected to the PSR's inclusion in the base offense level of any drug quantities or offenses other than the marijuana offense involving 375 or 1,000 pounds of the substance. (J.A. 54-57, 60-62, 63-65). The Government specifically objected to the inclusion of the other offenses and drug quantities on the ground that the PSR's calculation was in error because the offenses grouped were "separate agreements and separate offenses." (J.A. 61). The argument was aimed at section 1B1.3's requirement of a "common course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2). Having heard the arguments of the parties, the district court found that the facts in the PSR were true and that the relevant conduct was "relevant conduct related to the charge to which [Mr. Witte] pleaded guilty." (J.A. 68-69). To the extent that this was insufficient to overrule the Government's or Mr. Witte's specific objections, the district court explicitly stated that "other objections, if any, are overruled." (J.A. 69).

Mr. Witte stood before the district court at sentencing, therefore, exposed to 292 to 365 months of imprisonment for all offenses and the entire course of conduct in which he had participated, or otherwise joined. The guidelines, as found by the district court, mandated this result. (J.A. 68) (probation officer's job in analyzing facts was "what the Sentencing Reform Act requires").

When the Government moved the district court for a departure downward, it did not limit its request to a specific number of levels or number of months, but instead made the motion "without any recommendation on sentence" on the basis of Mr. Witte's having been debriefed. (J.A. 57). The Government, therefore, authorized the district court to exercise its discretion to depart downward by any number of levels or months on the

basis of its assessment of Mr. Witte's cooperation. If the court felt that Mr. Witte's assistance was substantial, it was free to subtract from the imprisonment range, as calculated, the entire sentence that would have been imposed on the *charged* marijuana offense only. *See supra* text, at 9 n.3 (63 to 78 months or 78 to 97 months). If the court believed that Mr. Witte's assistance was outstanding, it was free to subtract from the imprisonment range additional months that would have been imposed on the cocaine and other offenses only. In other words, the Government did not tell the court that it could not depart downward by more than 78 or 97 months on the ground that this would result in a reduction of the punishment for the cocaine offense, which the Government had contended was not part of the marijuana offense.

More significantly, when the court departed downward by 148 months from the 292-month minimum of the range and sentenced Mr. Witte to 144 months in custody, the Government did not object on the ground that the court had reduced Mr. Witte's sentence by more than was authorized by the Government's motion on the so-called marijuana offense. (J.A. 68-69). Had the Government appealed the court's action, it would have found itself in a posture of asserting plain error. *See United States v. Olano*, 113 S. Ct. 1770, 1774-75 (1993). The Government did not appeal, however, but instead obtained an indictment in Case No. 92-207 on the cocaine offense.

The foregoing analysis demonstrates that, pursuant to the guidelines, Mr. Witte was punished for all real offenses in Case No. 91-033 and received a procedurally complete and final sentence for those offenses. It further demonstrates that the punishment imposed for the cocaine offenses was not merely an "enhancement" to the punishment for the charged offense, as the Government

argued in the court below. *See Wittie*, 25 F.3d at 257; (J.A. 151). First, the base offense level was pegged to a violation of 21 U.S.C. § 846, the drug conspiracy offense, not to the violation of 21 U.S.C. § 841(a)(1), to which Mr. Witte entered a plea of guilty. Thus, the calculation of punishment did not even begin with the offense to which Mr. Witte pleaded guilty.

Second, all real offenses were grouped and quantified, and the aggregate drug amount resulted in a base offense level of 40, because the real offenses were all part of Mr. Witte's jointly undertaken activity. Rejecting the Government's argument, the court sentenced Mr. Witte on all offenses as quantified, finding that they were jointly undertaken and part of the same course of conduct or scheme. In this regard, the charged offense was not distinguished.

Third, Mr. Witte would have faced no different base offense level or range of punishment had he been charged with and pleaded guilty to all offenses. Especially with regard to drug offenses, the guidelines mandate this result whether or not the jointly undertaken activity is "charged as a conspiracy" and whether or not the defendant "has been convicted of multiple counts." U.S.S.G. § 1B1.3(a)(1)(B); *id.* comment. (nn.2 & 3). This result also avoids "double counting," punishes "the offender as if there were a single count involving the total amount," "limit[s] the significance of the formal charging decision and . . . prevent[s] multiple punishment for substantially identical offense conduct." U.S.S.G. § 3D1.2, comment. (n.4, ex.4); *id.* Ch. 3, Pt. D, intro. comment.; Breyer, *supra*, at 27. The guidelines further specifically state that offenses "under 21 U.S.C. §§ 841 and 960 receive identical punishment." U.S.S.G. § 2D1.1, comment. (backg'd.). Thus, the express language and intent of the guidelines

rebut any suggested distinction between a charged drug offense and other drug offenses used to calculate the base offense level.

Finally, although Mr. Witte's final sentence of 144 months did not include all punishment that he might have received for the cocaine transactions, the sentence did not result from any failure to hold him accountable for all drug transactions or to subject him to punishment for them. That Mr. Witte received a sentence below that attributable to the cocaine transactions resulted from the Government's failure to clearly inform the district court of the result it wanted, if it did want that, and its failure to object to a departure downward to a sentence of 144 months as contrary to the discretion it seemingly accorded to the district court.

Thus, Mr. Witte was punished in Case No. 91-033 for the cocaine offenses in accordance with the substantive and procedural requirements of the guidelines. The language, purposes, and function of the guidelines leave no room for the argument that Mr. Witte was not punished in Case No. 91-033 for the cocaine offenses indicted in Case No. 92-207 on the ground that the base offense level for the offense charged in Case No. 91-033 was merely "enhanced" by the offenses later charged in Case No. 92-207.

Nor do *Williams v. Oklahoma*, 358 U.S. 576 (1959), or other pre- or post-guideline enhancement cases show the contrary. On the facts of *Williams*, this Court held that a state court had not "punished petitioner a second time for the same offense" when it considered the fact that the petitioner had murdered his kidnapping victim, and it imposed a sentence of death for the kidnapping, even though the petitioner previously had been sentenced by a different state court to life in prison for the murder.

Williams, 358 U.S. at 586. This Court further found that "the sentencing judge is authorized, if not required to consider, all mitigating and aggravating circumstances involved in the crime." *Id.* at 585. The basis of the Court's holding in part was that the prior charge of murder to which the petitioner had pleaded guilty had made no "reference to the crime of kidnapping, and the charge of kidnapping involved in this case made no reference to murder." *Id.* at 585.

For a number of reasons, *Williams* does not show that Mr. Witte's sentence in Case No. 91-033 was merely enhanced under the federal guidelines and that he thus was not punished for the cocaine offenses in that case. First, a judge such as the one in *Williams* "was not *required* to take into account any real offense behavior, as would be the case with binding sentencing guidelines incorporating real-offense sentencing." Yellen, *supra*, at 418 (emphasis in original). Second, real offense sentencing such as in *Williams* was "sporadic and unpredictable" and the weight given to real offense elements was hidden. *Id.* at 418-19. Thus, there was no way for an appellate court to discern for what offense a defendant had been punished except by reference to the crime charged. *See infra* text, at Section II.B. (discussing the *Blockburger* test pre- and post-guidelines). In Mr. Witte's case, however, as in all guideline drug cases, the sentencing court does not merely "consider" an uncharged drug offense and give it some hidden weight, the court quantifies all related drug offenses and arrives at a base offense level that punishes them. This result is mandatory. *See, e.g., United States v. Colon*, 905 F.2d 580, 586-87 (2d Cir. 1990) (additional drugs must be incorporated into base offense level), *remanded for resentencing, sentence aff'd* 961 F.2d 41 (2d Cir. 1992).

Third, *Williams* rests on the premise that the murder charge and the kidnapping charge did not reference each other. *Williams*, 358 U.S. at 585. As explained below in Section II.B., however, Congress has incorporated the guidelines into the federal criminal code, and the guidelines not only cross-reference drug offenses, but also punish them together in the base offense level. *See infra* text, at 41-47. In fact, had *Williams* been a federal guidelines case, his punishment in the *kidnapping case* would have been the mandatory punishment for murder because of the express cross-reference in the kidnapping guideline to the murder guideline. *See* U.S.S.G. § 2A4.1(c) (requiring application of § 2A1.1 (First Degree Murder)). Thus, the premise of *Williams* is undercut by the guidelines.

To find, as the Fifth Circuit found, that the guidelines do "not change the analysis of the punishment issue in *Williams*," *Wittie*, 25 F.3d at 258; (J.A. 154), overlooks the mandatory real offense sentencing system promulgated by the guidelines. The point is not that *Williams* was wrong or must be overruled, but is that *Williams* was decided before the advent of the guidelines on the basis of sentencing practices that did not mandate specific rules of punishment. *Williams*, therefore, does not control this case. Nor do other similar pre-guidelines cases. *See, e.g., Sekou v. Blackburn*, 796 F.2d 108, 111-12 (5th Cir. 1986) (discussing *consideration* of other crimes).

Cases regarding the punishment of a defendant on the basis of prior criminal history also do not advance the analysis in this case. *See, e.g., Nichols v. United States*, 114 S. Ct. 1921, 1927-28 (1994). The guidelines specifically address criminal history in a measure distinct from the base offense level. *See* U.S.S.G. Ch. 4. If the guidelines' treatment of criminal history shows anything with regard

to this case, it shows that the criminal history of a defendant is not increased unless a prior sentence was imposed "for conduct [that was] *not* part of the instant offense." U.S.S.G. § 4A1.2(a)(1) (emphasis added). By analogy, this supports Mr. Witte's position.

Finally, this case is not one in which the sentencing court merely "adjusted" a defendant's total offense level by two points due to some aspect of the offense or proceeding not taken into account by the base offense level and in which the defendant later was prosecuted. *See, e.g., United States v. Duarte*, 28 F.3d 47, 48-49 (7th Cir. 1994). The guidelines themselves distinguish between the base offense level on the one hand, and specific offense characteristics and adjustments on the other hand. If a defendant, for example, received a two-level "adjustment," *see* U.S.S.G. Ch. 3 ("Adjustments"), to his drug offense sentence for obstruction of justice, *see id.* § 3C1.1, one possibly could argue that he initially had not been sentenced and punished to the full extent under the specific guideline for the offense of threatening a witness, but merely had received an enhancement for his conduct during the drug prosecution. *Duarte*, 28 F.3d at 48.

Nevertheless, that is not the case before this Court, and the Court need not decide that issue. In Mr. Witte's case, his base offense level and guideline range included all drug offenses and all drug quantities for which he could be punished under federal statutes and the guidelines. As shown above, he was punished for those offenses in Case No. 91-033 in accordance with the procedural and substantive requirements of the guidelines, and he received a procedurally complete and final sentence.

II. THE DOUBLE JEOPARDY CLAUSE BARS PUNISHING MR. WITTE AGAIN FOR OFFENSES FOR WHICH HE ALREADY HAS BEEN PUNISHED.

A. Congress Cannot Authorize the Imposition of Cumulative Punishment for One Offense in Two Criminal Proceedings, and the Fifth Circuit Thus Erred.

"This Court many times has held that the Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *United States v. Halper*, 490 U.S. 435, 440 (1989) (citing *Pearce v. North Carolina*, 395 U.S. 711, 717 (1969)). "The third of these protections . . . has deep roots in our history and jurisprudence." *Halper*, 490 U.S. at 440. The constitutional proscription against multiple punishments safeguards " 'humane interests,' " and the protection "is intrinsically personal." *Id.* at 447 (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 554 (1943) (Frankfurter, J., concurring)).

When cumulative punishments are imposed at a single proceeding, "the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Brown v. Ohio*, 432 U.S. 161, 165 (1977); *see also Missouri v. Hunter*, 459 U.S. 359, 366-68 (1983). Nevertheless:

> [W]hen the Government already has imposed a criminal penalty and seeks to impose additional punishment in a second proceeding, the Double Jeopardy Clause protects against the possibility that the Government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding.

Halper, 490 U.S. at 451 n.10; *see also Dep't of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1948 (1994); *United States v. Dixon*, 113 S. Ct. 2849, 2857 (1993) (White, J., concurring in part and dissenting in part).

On the basis of these principles, this Court recently held that the assessment of a drug tax in a second proceeding for possession and storage of marijuana after conviction and punishment for the criminal offense violated the protection of the Double Jeopardy Clause against multiple punishments. *Kurth Ranch*, 114 S. Ct. at 1948. As the Court recognized, "Montana no doubt could collect its tax on the possession of marijuana, for example, if it had not previously punished the taxpayer for the same offense, or, if it had assessed the tax in the same proceeding." *Id.* at 1945. Nevertheless, because the tax was punitive, the Double Jeopardy Clause required that it had to be "imposed during the first prosecution or not at all." *Id.* at 1948. The Court also found it "significant that the same sovereign that criminalized the activity also imposed the tax." *Id.* at 1947 n.22; *see also Dixon*, 113 S. Ct. at 2871-72 (White, J., concurring in part and dissenting in part) (discussing *Grafton v. United States*, 206 U.S. 333 (1907)). Similarly, in *Halper*, the Court struck down a civil penalty sought in a second proceeding after the defendant had been criminally convicted in a prior proceeding because, although legislative intent is the touchstone of whether multiple punishments can be imposed in one proceeding, the Double Jeopardy Clause bars multiple punishments for the same offense in two separate proceedings. *Halper*, 490 U.S. at 450-51 & n.10.

In its analysis, the Court of Appeals for the Fifth Circuit assumed that both prosecutions involved the "same offense." *United States v. Wittie*, 25 F.3d 250, 255 & n.17 (5th Cir. 1994); (J.A. 145 & n.17). The Fifth Circuit "address[ed] the issues in this case . . . as they were

presented by the parties." *Id.* at 255 n.17; (J.A. 145 n.17). The Court also accepted for purposes of its analysis that Mr. Witte had "been punished by inclusion of the cocaine activities in relevant conduct and proceed[ed] to consider whether a second punishment [was] nonetheless permitted by Congress." *Id.* at 258; (J.A. 154). The Fifth Circuit did this because it failed to recognize the distinction established by this Court's precedent between the imposition of multiple punishments for one offense in a single proceeding and the imposition of such in multiple proceedings. *See id.* at 255 & n.15; (J.A. 144 & n.15) (using *Missouri v. Hunter*, 459 U.S. 359, 367 (1983), and *Albernaz v. United States*, 450 U.S. 333, 344 (1981), to support the statement that legislative intent governs the imposition of multiple punishments for the same offense). Of course, if Congress could legislate an intent to impose multiple punishments for the same offense in multiple proceedings, this would render the Double Jeopardy Clause nugatory. *See Halper*, 490 U.S. at 451 n.10.

The mistaken interpretation of this Court's precedent led the Fifth Circuit to conclude that, "[u]nder § 5G1.3(b), then, Congress allows 'double punishment' for the cocaine offense," and that Mr. Witte, for example, could be sentenced in a second proceeding to an additional 118 months in prison on the basis of that offense. *Wittie*, 25 F.3d at 261; (J.A. 162). In light of the parties' and the court's assumption that the same offense was involved in both prosecutions, however, the court's conclusion clearly is constitutionally wrong. *See Halper*, 490 U.S. at 451 n.10.

Principles of statutory construction, the objectives of the guidelines, and the commentary, language, and examples of section 5G1.3(b) also show that the Fifth Circuit's conclusion was erroneous. Section 5G1.3, which is entitled "Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment," states, in part:

> (b) If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.

U.S.S.G. § 5G1.3(b).

The commentary in the guidelines is binding on federal courts, *see Stinson*, 113 S. Ct. at 1919, and the policy statements are authoritative guides to the applicable guidelines. *See Williams*, 112 S. Ct. at 1119. In addition, in interpreting the guidelines, the Court should look first to the language of the guidelines themselves and assume that words are used as they are commonly and ordinarily understood and that their plain meaning is apparent from their terms. *Cf. Moskal v. United States*, 498 U.S. 103, 108 (1990); *Hughey v. United States*, 495 U.S. 411, 415 (1990); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). When engaging in statutory construction, moreover, the Court looks "not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990). A fundamental rule of statutory construction also "requires that statutes are to be construed, if possible, in harmony with the Constitution and other applicable statutes." *Kohler Co. v. Moen Inc.*, 12 F.3d 632, 642 (7th Cir. 1993) (citing *New York v. Ferber*, 458 U.S. 747, 769 & n.24 (1982)). Thus, statutory provisions must be read *in pari materia*. *Mail Order Ass'n of America v. United States Postal Service*, 986 F.2d 509, 515 (D.C. Cir. 1993).

The language and the commentary of section 5G1.3 show that the Commission intended the section to apply when all real offenses or relevant conduct had *not* been

punished in an initial sentencing. The commentary to 5G1.3 states that "[e]xcept in the cases in which subsection (a) applies, this guideline is intended to result in an *incremental punishment for the instant offense* that most nearly approximates the sentence that *would have been imposed had all the sentences been imposed at the same time.*" U.S.S.G. § 5G1.3, comment. (backg'd.) (italics deleted; emphasis added). By the express language of the commentary, the Sentencing Commission intends section 5G1.3 to apply when there is a need for incremental punishment. When a defendant is sentenced in accordance with the guidelines in one proceeding for all real offenses, however, there is and should be no need for incremental punishment in a later proceeding. In fact, a second sentencing for all such offenses would contradict the objectives implemented in the first three chapters of the guidelines, which include uniformity, proportionality, and the avoidance of charge manipulation. *See supra* text, at 14-18.

By the express language of the commentary, the Commission also intends section 5G1.3 to achieve a sentence "that most nearly approximates the sentence that *would have* been imposed had all the sentences been imposed at the same time." U.S.S.G. § 5G1.3, comment. (backg'd.) (italics deleted; emphasis added). This presumes that the sentence for all offenses (*i.e.*, the offense of conviction and all relevant conduct, U.S.S.G. § 1B1.1, comment. (n.1(l)), was not imposed at the same time. *See Random House Dictionary of the English Language* 2191 (2d ed. unabridged 1987) (definition 9 of "would": "9. would have, (used with a past participle to express unfulfilled intention or desire)") (emphasis deleted). The presumption does not obtain, however, when the defendant *has been* sentenced for all real offenses in an initial proceeding. Nor would any *approximation* be necessary when the

first proceeding and the second proceeding have the exact same relevant conduct and guidelines.

The language of subsection (b) of 5G1.3, moreover, distinguishes between "offense(s)" from which the undischarged term of imprisonment resulted and "the instant offense." *See* U.S.S.G. § 5G1.3(b). Had the Commission intended to authorize two concurrent punishments in two proceedings for all of the same relevant conduct or real offenses, it would not have used two different terms, but rather would have stated: "If . . . the undischarged term of imprisonment resulted from [the instant offense], . . . the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment." This construction of 5G1.3(b) not only sounds odd, but it also conflicts with the purposes and provisions of the first three chapters of the guidelines. *See supra* text, at 14-23. The omission of "instant" from the first part of section 5G1.3(b) and its inclusion in the second part of the section require a presumption that the Commission acted intentionally and purposely in drafting the language. *See Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588, 1593 (1994).

The distinction between "offense" and "instant offense" is significant in the construction of the phrase, "offense(s) that have been *fully taken into account* in the determination of the offense level for the instant offense." U.S.S.G. § 5G1.3(b) (emphasis added). To "take into account" means to "make allowance for" or to "consider." *See Random House Dictionary of the English Language* 13 (2d ed. unabridged 1987) (definition 19 of "account"). Thus, section 5G1.3(b) applies when the offense level for the instant offense has fully considered the offense(s) that resulted in the undischarged term of incarceration. This implies a relationship between "the instant offense" and the "offense(s)" that is one of inclusion rather than of

equivalence. In sum, the language of section 5G1.3(b) implies that the section applies when the offense from which the undischarged term of imprisonment resulted is fully included in, but not the only determinant of, the offense level for the instant offense.

This construction is supported by the remaining commentary on and example of the proper application of section 5G1.3(b), as well as the design of the guidelines as a whole and their object and policy. *See Crandon*, 494 U.S. at 158. The commentary states that subsection (b) addresses a situation, "for example, where a defendant is prosecuted in both federal and state court, or in two or more federal jurisdictions, for the same criminal conduct or for different criminal transactions that were part of the same course of conduct." U.S.S.G. § 5G1.3, comment. (n.2) (italics omitted).

The commentary at least makes clear that section 5G1.3(b) applies when two prosecutions are instituted in *two* different jurisdictions, and not one, as occurred in Mr. Witte's case. The commentary, however, refers to "the same criminal conduct or . . . different criminal transactions that were part of the same course of conduct." *Id.* What is unclear is what is meant by "the same criminal conduct." That the Commission did not use the term "same relevant conduct" implies a difference in the scope of the two prosecutions and leaves open to question whether it meant "the same type of criminal conduct," "the same criminal conduct to the same extent," or "the same criminal conduct to a lesser extent."

The only example given in the commentary involves an undischarged sentence that is based upon "the same course of conduct." *Id.* Nevertheless, it confirms that the Commission intended section 5G1.3(b) to apply and to authorize incremental punishment only when the relevant conduct in the second proceeding is greater than

(*i.e.*, takes full account of) the offense that resulted in the undischarged term of incarceration. *Id.* (relevant conduct of 45 grams of cocaine includes 15 grams on which the defendant is imprisoned in state custody). The example confirms that the Commission intended section 5G1.3(b) to apply when all relevant conduct was *not* addressed in the prior sentencing.

Thus, the language and commentary of section 5G1.3 confirm that subsection (b) "applies where a defendant's offense level in a second prosecution is set taking into account conduct that has already been the subject of a conviction and sentencing," in contrast to a case in which the "first conviction and sentencing took into account conduct that is now the subject of the second prosecution." *United States v. McCormick*, 992 F.2d 437, 441 n.3 (2d Cir. 1993). "In the first case, the Commission requires concurrent sentencing in order to avoid multiple punishments." *Id.* Section 5G1.3(b), however, does not cure the imposition of multiple punishment in the second case. *See id.* The two situations do not represent "two sides of the same coin." *Id.* at 443 (Mahoney, J., dissenting). The construction of section 5G1.3(b) that allows a second prosecution and sentencing when all relevant conduct and real offenses have been punished in a prior proceeding would promote charge manipulation, disparity, lack of uniformity, and forum shopping in sentencing, all of which are contrary to the objectives of the Guidelines. *See supra* text, at 14-23. Such a construction must be disfavored. *See Crandon*, 494 U.S. at 158.

In sum, section 5G1.3(b) by its terms, commentary, and example applies to a second sentencing when the first sentencing did not take into account all relevant offense conduct and the second sentencing does. In this manner, the Sentencing Commission, consistent with its objectives, sought to avoid double counting of relevant

conduct. To construe section 5G1.3(b) as authorizing a second prosecution and punishment when the first prosecution and sentencing held the defendant accountable for all relevant conduct and real offenses is to assume that the Sentencing Commission drafted the first three chapters of the guidelines to promote uniformity, real offense sentencing, and proportionality, as well as to prevent charge manipulation, and that it then turned around and created section 5G1.3(b) as a vehicle to defeat and dismantle all that it had accomplished with the first three chapters. Such a construction contradicts the object and policy of the guidelines and their design as a whole. *See Crandon*, 494 U.S. at 158. It also fails to read the first three chapters and the fifth chapter *in pari materia*. *See United States Postal Service*, 986 F.2d at 515. Finally, because the Fifth Circuit's construction of section 5G1.3(b) authorizes violations of the Double Jeopardy Clause, the alternative construction adopted in *McCormick*, 992 F.2d at 441 n.3, is required. Indeed, the Fifth Circuit's construction violates the Double Jeopardy Clause even when two federal districts are involved, for the protections of the clause apply to one sovereign even when two proceedings are in different courts of that sovereign. *See Dixon*, 113 S. Ct. at 2871-72 (White, J., concurring in part and dissenting in part).

Thus, if this case is addressed as it was presented and decided below, on the assumption that the "same offense" was involved in both prosecutions, and if the only issue in this case is whether section 5G1.3(b) authorizes the imposition of an additional 118 months or more of imprisonment in Case No. 92-207 for the cocaine offenses and other real offenses (*e.g.*, conspiring to import fifteen tons of marijuana), the answer is that it does not and cannot. Put simply, Congress cannot constitutionally

legislate punishing someone twice in two separate proceedings for the same offense. If the Court addresses this case beyond its posture in the court below, Mr. Witte offers the following additional arguments.

B. Congress Has Incorporated the Guidelines into the Federal Criminal Code, and a Federal Court Cannot Ignore the Mandate of Congress and the Express Language of the Guidelines in Determining Whether a Defendant Is Being Twice Punished in Separate Proceedings for the Same Offenses.

The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. "In both the multiple punishment and multiple prosecution contexts, this Court has concluded that where two offenses for which the defendant is punished or tried cannot survive the 'same-elements' test, the double jeopardy bar applies." *Dixon*, 113 S. Ct. at 2856. The test "inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution." *Id.*

In *Dixon*, this Court held that the prosecution of Dixon for possession of cocaine with intent to distribute it was barred because he previously had been found guilty of criminal contempt and sentenced for violating his conditions of release, on an unrelated charge, by possessing the cocaine with intent to distribute it. *Id.* at 2857-58. Dixon's conditions of release did not specify that he was not to commit the offense of possessing cocaine with intent to distribute it, but only "specified that he was not to commit 'any criminal offense.' " *Id.* at 2853. At the show cause hearing for criminal contempt, the court

concluded that the government had established beyond a reasonable doubt that Dixon had possessed cocaine with intent to distribute it. *Id.*

In reaching its conclusion that the later prosecution on the drug offense was barred, this Court recognized that, although the statute proscribing the drug offense and the statute authorizing the contempt proceeding literally were different, the judge who had issued the pretrial order of release had "*incorporated* the statutory drug offense into his release order." *Id.* at 2857 (emphasis added). The Court further reasoned that the later attempt to prosecute Dixon for the drug offense resembled "the situation that produced our judgment of double jeopardy in *Harris v. Oklahoma*, 433 U.S. 682 . . . (1977) (per curiam)," in which "a subsequent prosecution for robbery with a firearm was barred by the Double Jeopardy Clause, because the defendant had already been tried for felony murder based on the same underlying felony." *Dixon*, 113 S. Ct. at 2857 (parallel citation omitted).

Just as the crime of felony murder could not be separated from its elements in *Harris*, in *Dixon* the "crime" of violating a condition of release could not "be abstracted from the 'element' of the violated condition." *Id.* The Court, therefore, concluded that "[t]he *Dixon* court order incorporated the entire governing criminal code in the same manner as the *Harris* felony-murder statute incorporated the several enumerated felonies." *Id.* Thus, the later prosecution of Dixon was barred under the "same-elements" test. *Id.* at 2858.

Just as the trial court's order of release in *Dixon* incorporated the entire criminal code, so too has Congress incorporated the United States Sentencing Guidelines into each provision of the federal criminal code. *See, e.g., United States v. R.L.C.*, 112 S. Ct. 1329, 1334-39 (1992)

(holding that revised juvenile punishment statute incorporated the maximum guideline term of imprisonment). Congress, in fact, expressly mandated the application of the guidelines for violations of federal law in 18 U.S.C. § 3553(b). *See R.L.C.*, 112 S. Ct. at 1334; *see also Mistretta*, 488 U.S. at 367-68 (guidelines are binding on the courts). Thus, under the revolution wrought by the Sentencing Reform Act, *Burns*, 501 U.S. at 132, federal courts must look to the guidelines to determine the nature and length of a federal sentence. In other words, by act of Congress the guidelines "are a sentencing imperative." *United States v. Davern*, 970 F.2d 1490, 1492 (6th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1289 (1993).

In carrying out its statutory mandate under 28 U.S.C. § 994 to promulgate the guidelines, the Sentencing Commission, as discussed above, adopted modified real offense sentencing to achieve honesty, uniformity, and proportionality in sentencing and to prohibit unfair treatment through count manipulation. *See supra* text, at 14-23. To these ends, the Commission defined "offense" as "*the offense of conviction and all relevant conduct* under § 1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context." U.S.S.G. § 1B1.1, comment. (n.1(l)) (italics deleted; emphasis added). The relevant conduct provisions mandate that a court hold a defendant accountable for "all acts and omissions" committed, aided, abetted or "wilfully caused" by him or her, all jointly undertaken criminal activity, "whether or not charged as a conspiracy," and all acts and omissions grouped under § 3D1.2. *See* U.S.S.G. § 1B1.3(a)(1)-(2); *see also supra* text, at 18-20 (quoting section 1B1.3).

With regard to drug offenses, the guidelines group the offenses on the basis of drug quantity and base the sentence on the total quantity regardless of whether the

defendant was convicted of multiple counts, *see* U.S.S.G. § 3D1.2(d); *see also id.* § 1B1.3(1)(B), comment. (n.3); *supra* text, at 20-23, and section 2D1.1 supplies the base offense level for virtually all drug offenses. *See supra* text, at 21. The guidelines, moreover, have mandated that drug offenses "under 21 U.S.C. §§ 841 and 960 receive identical punishment based on the quantity of the controlled substance involved, the defendant's criminal history, and whether death or serious bodily injury resulted from the offense." U.S.S.G. § 2D1.1, comment. (backg'd.). In addition, where "there are multiple transactions or multiple drug types, the quantities are to be added." *Id.* comment. (n.6).

On the mandate of Congress, therefore, the guidelines require that a defendant charged with and convicted of any violation of 21 U.S.C. §§ 841, 846, 952, 960, or 963 have his or her base offense level set on the basis of the total quantity of drugs and that the trial court punish him or her for all real drug offenses committed, regardless of the crime charged or its elements. This incorporation of the guidelines into the provisions of the federal criminal code by express mandate of Congress can no more easily be abstracted from the code than the incorporation of the entire criminal code could be abstracted from the release order in *Dixon*. *See* 113 S. Ct. at 2857.

In sum, to determine the "offenses" for which a defendant was punished, one must look to the offenses for which a defendant was punished pursuant to the guidelines. Under this Court's precedent, if the same offenses previously have been punished in a prior proceeding, then "double jeopardy bars additional punishment." *Dixon*, 113 S. Ct. at 2856. Application of this test to the real offenses punished under the guidelines does no more than to give due recognition to the long-standing

principle that "the substantive power to prescribe crimes and determine punishments is vested with the legislature." *Ohio v. Johnson*, 467 U.S. 493, 499 (1984). With regard to the imposition of multiple punishments in multiple proceedings, however, it also makes clear that, although Congress can punish multiple offenses in one proceeding, this does not mean that a criminal court can punish those offenses *"yet again." Dixon*, 113 S. Ct. at 2857 (emphasis in original).

Nor is this application of the "same-elements" test at odds with this Court's prior application of the test. For example, in the *single-proceeding context*, the Court has held that the "Blockburger test is a 'rule of statutory construction,' and because it serves as a means of discerning congressional purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent." *Albernaz v. United States*, 450 U.S. 333, 340 (1981). In *Albernaz*, the Court found no clear indication of contrary intent and affirmed the imposition of consecutive sentences for violations of 21 U.S.C. §§ 846 and 963.

Of course, prior to the advent of the guidelines, there was no mandate that importation and possession of controlled substances "receive identical punishment based on the quantity of the controlled substance involved," U.S.S.G. § 2D1.1, comment. (backg'd.) (italics deleted), or that where "there are multiple drug transactions or multiple drug types, the quantities are to be added." *Id.* comment. (n.6). Thus, the guidelines clearly have spoken on matters on which the Court could find no direction prior to their promulgation. Left with only the elements of the charged offenses on which to divine congressional intent in the single-proceeding context, the application of the "same-elements" test to the charged offenses unquestionably was the only route of analysis. *See Whalen v.*

United States, 445 U.S. 684, 692 (1980) (noting that Congress rarely specified its intent on concurrent and consecutive sentences). Indeed, the test still should be employed in situations in which a legislature has not mandated mandatory real offense sentencing or otherwise clearly indicated its intent. That is not the situation, however, in which federal courts find themselves after the advent of the guidelines.

Applying the guidelines to *Blockburger v. United States*, 284 U.S. 299 (1932), itself illustrates the radical difference in the punishment of offenses wrought by the Sentencing Reform Act. Blockburger was convicted and sentenced on three counts charging the sale of narcotics. *Id.* at 300. He was sentenced to five years imprisonment and a fine of $2,000 on each count, with the terms of imprisonment to run consecutively. *Id.* The third count of conviction alleged that the same sale charged in the second count of conviction violated a different statute. *Id.* On the second and third counts of conviction, the Court applied the "same-elements" test and found that they were separate offenses. *Id.* at 303-05. Blockburger argued that the consecutive punishment was too harsh because one and the same sale violated two different statutes. *Id.* at 305. This Court's response was that the "plain meaning of the provision is that each offense is subject to the penalty prescribed; if that be too harsh, the remedy must be afforded by act of Congress, not by judicial legislation under the guise of construction." *Id.*

The Sentencing Reform Act is the very "act of Congress" that *Blockburger* foresaw. Under the guidelines, Blockburger's offenses would have been grouped, *see* U.S.S.G. §§ 1B1.3(a)(1)-(2), 2D1.1(c), 3D1.2(b), (d), and his sentence would have been determined on the basis of the total quantity of drugs. *Id.* § 2D1.1(c) & comment. (n.6). The sentences on all counts of conviction then would

have run *concurrently*. *Id.* § 5G1.2(b), (c). To apply the *Blockburger* "same-elements" test to the charged offenses in order to discern for double jeopardy purposes for what and how a defendant is or has been punished under the guidelines not only fails to give effect to the mandate of Congress as implemented by the guidelines, but it also fails to account for how Blockburger himself would have been sentenced fifty-five to sixty years later.

In sum, in determining the offenses for which a defendant has been sentenced, a federal court cannot ignore the mandate of Congress and the express language of the guidelines. Congress and the guidelines mandate that federal courts sentence defendants, especially in drug cases, for the charged offense and other real offenses. As such, the *Blockburger* test must be applied to those offenses, as defined by the guidelines, to determine whether a defendant is being punished twice for them in multiple criminal federal proceedings.

C. Punishing Mr. Witte Again in Case No. 92-207 Is Punishing Him Twice for the Same Offenses in Violation of the Double Jeopardy Clause.

As discussed above, Mr. Witte was punished in Case No. 91-033 for the cocaine offenses and all real offenses because: (1) his base offense level was calculated not on the basis of the offense to which he pleaded guilty, but rather on the basis of the real offense of conspiracy; (2) all real offenses were grouped in arriving at a base offense level of 40; (3) no different punishment would have been imposed had Mr. Witte entered a plea of guilty to all real offenses; and (4) the sentence of 144 months in custody resulted from the Government's motion for a downward departure and its failure to make known to the court any limit it desired on the court's discretion in imposing a particular sentence. *See supra* text, at 23-28.

Mr. Witte's base offense level in Case No. 92-207 "will necessarily be the same" as it was in Case No. 91-033, because relevant conduct is the same in both cases. *Wittie*, 25 F.3d at 261; (J.A. 161). There will be no motion for a departure downward for substantial assistance in the prosecution of Mr. Pokorny, because Mr. Pokorny himself has entered a plea of guilty, has received the benefit of such a motion, and has received a sentence of 192 months in custody. *See* Sentencing, *United States v. Pokorny*, Cr. No. 92-207 (S.D. Tex. filed Oct. 25, 1993) (docket entry 45). Thus, assuming the same or similar adjustments as those made in Case No. 92-207, Mr. Witte again will be sentenced on the basis of an imprisonment range of 292 to 365 months. *See Wittie*, 25 F.3d at 261; (J.A. 162). Although the Fifth Circuit used an example in which Mr. Witte might be sentenced to an additional 118 months in Case No. 92-207, *see Wittie*, 25 F.3d at 261; (J.A. 162); *see also supra* text, at 11 n.5, in reality he faces a potential additional sentence of 191 months, assuming as the Fifth Circuit did, that Mr. Witte will have served thirty months at the time of his sentencing (*i.e.*, 365 less 144 less 30 equals 191).

When the *Blockburger* test is applied to the offenses on which punishment was imposed pursuant to the guidelines in Case No. 91-033 and the offenses on which punishment will be imposed in Case No. 92-207, *see supra* text, at 7, it is apparent that the imposition of additional punishment violates the Double Jeopardy Clause. Mr. Witte will be punished for the same conspiracy and for the same attempted importation and possession of marijuana and cocaine. In addition, in Case No. 91-033, the district court rejected the Government's argument that the real offenses in question constituted "separate agreements and separate offenses," (J.A. 61, 68-69), and the Government did not appeal that ruling. The guarantee of

the Double Jeopardy Clause "serves 'a constitutional policy of finality for the defendant's benefit.' " *Brown v. Ohio*, 432 U.S. 161, 165 (1977) (quoting *United States v. Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion)); *see also Ashe v. Swenson*, 397 U.S. 436, 445-46 (1970) (rule of collateral estoppel is embodied in the guarantee against double jeopardy). Punishing Mr. Witte again also violates this constitutional guarantee of finality.

On the facts of this case, therefore, punishing Mr. Witte in Case No. 92-207 is punishing him twice for the same offense in violation of the Double Jeopardy Clause. A federal criminal court already has imposed a procedurally complete and final sentence pursuant to the guidelines for the offenses Mr. Witte committed. Mr. Witte was "forced to run the gauntlet once" for his offenses, *Green v. United States*, 355 U.S. 184, 190 (1957), and neither the Government nor Congress can force him to run it again in a second proceeding. *See Halper*, 490 U.S. at 451 n.10. Even if Congress could do so, however, the guidelines, in their approach to the punishment of drug crimes, whether charged or uncharged, express an intention not to create duplicative punishment for persons falling within the overlap of federal drug statutes. *See Ball v. United States*, 470 U.S. 856, 864 (1985). Thus, even a strictly concurrent sentence, if there is such, could not be imposed on Mr. Witte. *Id.* at 748; *see also Ray v. United States*, 481 U.S. 736, 737 (1987) (sentences are not concurrent when liability to pay total assessment rests upon validity of each conviction).

Rooted in the history of Western Civilization, the Double Jeopardy Clause guarantees that "affliction shall not rise up the second time," and it embodies the maxim that "[n]ot even God judges twice for the same act." *Bartkus v. Illinois*, 359 U.S. 121, 152 n.4 (1959) (Black, J., dissenting). To inflict upon Mr. Witte an additional ten to

seventeen years in prison for offenses previously punished violates the letter and spirit of the Double Jeopardy Clause.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit Court of Appeals should be reversed, and the case should be remanded to that court with instructions to affirm the district court's dismissal of the indictment against the Petitioner in Case No. 92-207.

Respectfully submitted,

ROLAND E. DAHLIN II*
Federal Public Defender
Southern District of Texas

H. MICHAEL SOKOLOW
THOMAS S. BERG
Asst. Federal Public Defenders

440 Louisiana, Suite 310
P.O. Box 61508
Houston, TX 77208-1508
Telephone: (713) 238-9600

**Counsel of Record for Petitioner*

February 21, 1995

APPENDIX A

APPENDIX A

18 U.S.C. § 3553

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines

issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence. – The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard

for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(c) Statement of reasons for imposing a sentence. – The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence –

> (1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or
>
> (2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice. – Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an

order. Upon motion of the defendant or the Government, or on its own motion, the court shall –

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum. – Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on Applicability of Statutory Minimums in Certain Cases. – Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21

U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 961,[1] 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the government has been afforded the opportunity to make a recommendation, that –

> (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
>
> (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
>
> (3) the offense did not result in death or serious bodily injury to any person;
>
> (4) the defendant was not as organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. 848; and
>
> (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same

---

[1] So in original. Probably should be "960" (section 1010 of the Controlled Substances Import and Export Act is 21 U.S.C. § 960).

course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

(Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1989, and amended Pub.L. 99-570, Title I, § 1007(b), Oct. 27, 1986, 100 Stat. 3707-7; Pub.L. 99-646, §§ 8(a), 9(a), 80(a), 81(a), Nov. 10, 1986, 100 Stat. 3593, 3619; Pub.L. 100-182, §§ 3, 16(a), (17), Dec. 7, 1987, 101 Stat. 1266, 1269, 1270; Pub.L. 100-690, Title VII, § 7102, Nov. 18, 1988, 102 Stat. 4416; Pub.L. 103-322, Title VIII, § 80001(a), Title XXVIII, § 280001, Sept. 13, 1994, 108 Stat. ___, ___.)

APPENDIX B

APPENDIX B

U.S.S.G. § 1B1.3

§ 1B1.3. **Relevant Conduct (Factors that Determine the Guideline Range)**

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guidelines specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

Commentary

Application Notes:

1. *The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability. Under subsections (a)(1) and (a)(2), the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator.*

2. *A "jointly undertaken criminal activity" is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.*

In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was both:

(i) in furtherance of the jointly undertaken criminal activity; and

(ii) reasonably foreseeable in connection with that criminal activity.

Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the criminal activity jointly undertaken by the defendant (the "jointly undertaken criminal activity") is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant's accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement). The conduct of others that was both in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant is relevant conduct under this provision. The conduct of others that was not in furtherance of the criminal activity jointly undertaken by the defendant, or was not reasonably foreseeable in connection with that criminal activity, is not relevant conduct under this provision.

In determining the scope of the criminal activity that the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by

the defendant's agreement), the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others.

Note that the criminal activity that the defendant agreed to jointly undertake, and the reasonably foreseeable conduct of others in furtherance of that criminal activity, are not necessarily identical. For example, two defendants agree to commit a robbery and, during the course of that robbery, the first defendant assaults and injures a victim. The second defendant is accountable for the assault and injury to the victim (even if the second defendant had not agreed to the assault and had cautioned the first defendant to be careful not to hurt anyone) because the assaultive conduct was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

With respect to offenses involving contraband (including controlled substances), the defendant is accountable for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook.

The requirement of reasonable foreseeability applies only in respect to the conduct (i.e., acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes, aids, abets, counsel, commands, induces, procures, or willfully causes; such conduct is addressed under subsection (a)(1)(A).

A defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct (e.g., in the case of a defendant who joins an ongoing drug distribution conspiracy knowing that it had

been selling two kilograms of cocaine per week, the cocaine sold prior to the defendant joining the conspiracy is not included as relevant conduct in determining the defendant's offense level). The Commission does not foreclose the possibility that there may be some unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant's culpability; in such a case, an upward departure may be warranted.

Illustrations of Conduct for Which the Defendant is Accountable

(a) Acts and omissions aided or abetted by the defendant

(1) Defendant A is one of ten persons hired by Defendant B to off-load a ship containing marihuana. The off-loading of the ship is interrupted by law enforcement officers and one ton of marihuana is seized (the amount on the ship as well as the amount off-loaded). Defendant A and the other off-loaders are arrested and convicted of importation of marihuana. Regardless of the number of bales he personally unloaded, Defendant A is accountable for the entire one-ton quantity of marihuana. Defendant A aided and abetted the off-loading of the entire shipment of marihuana by directly participating in the off-loading of that shipment (i.e., the specific objective of the criminal activity he joined was the off-loading of the entire shipment). Therefore, he is accountable for the entire shipment under subsection (a)(1)(A) without regard to the issue of reasonable foreseeability. This is conceptually similar to the case of a defendant who transports a suitcase knowing that it contains a controlled substance and,

therefore, is accountable for the controlled substance in he suitcase regardless of his knowledge or lack of knowledge of the actual type or amount of that controlled substance.

In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. As noted in the preceding paragraph, Defendant A is accountable for the entire one-ton shipment of marihuana under subsection (a)(1)(A). Defendant A also is accountable for the entire one-ton shipment of marihuana on the basis of subsection (a)(1)(B) (applying to a jointly undertaken criminal activity). Defendant A engaged in a jointly undertaken criminal activity (the scope of which was the importation of the shipment of marihuana). A finding that the one-ton quantity of marihuana was reasonably foreseeable is warranted from the nature of the undertaking itself (the importation of marihuana by ship typically involves very large quantities of marihuana). The specific circumstances of the case (the defendant was one of ten persons off-loading the marihuana in bales) also support this finding. In an actual case, of course, if a defendant's accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established.

(b) Acts and omissions aided or abetted by the defendant; requirement that the conduct of others be in furtherance of the jointly undertaken criminal activity and reasonably foreseeable

(1) Defendant C is the getaway driver in an armed bank robbery in which $15,000 is taken and a

teller is assaulted and injured. Defendant C is accountable for the money taken under subsection (a)(1)(A) because he aided and abetted the act of taking the money (the taking of money was the specific objective of the offense he joined). Defendant C is accountable for the injury to the teller under subsection (a)(1)(B) because the assault on the teller was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

As noted earlier, a defendant may be accountable for particular conduct under more than one subsection. In this example, Defendant C also is accountable for the money taken on the basis of subsection (a)(1)(B) because the taking of money was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable (as noted, the taking of money was the specific objective of the jointly undertaken criminal activity).

(c) *Requirement that the conduct of others be in furtherance of the jointly undertaken criminal activity and reasonably foreseeable; scope of the criminal activity*

(1) *Defendant D pays Defendant E a small amount to forge an endorsement on an $800 stolen government check. Unknown to Defendant E, Defenant D then uses that check as a down payment in a scheme to fraudulently obtain $15,000 worth of merchandise. Defendant E is convicted of forging the $800 check and is accountable for the forgery of this check under subsection (a)(1)(A). Defendant E is not*

accountable for the $15,000 because the fraudulent scheme to obtain $15,000 was not in furtherance of the criminal activity he jointly undertook with Defendant D (i.e., the forgery of the $800 check).

(2) *Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains $20,000. Defendant G fraudulently obtains $35,000. Each is convicted of mail fraud. Defendants F and G each are accountable for the entire amount ($55,000). Each defendant is accountable for the amount he personally obtained under subsection (a)(1)(A). Each defendant is accountable for the amount obtained by his accomplice under subsection (a)(1)(B) because the conduct of each was in furtherance of the jointly undertaken criminal activity and was reasonably foreseeable in connection with that criminal activity.*

(3) *Defendants H and I engaged in an ongoing marihuana importation conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marihuana. Defendant J is accountable for the entire single shipment of marihuana he helped import under subsection (a)(1)(A) and any acts and omissions in furtherance of the importation of that shipment that were reasonably foreseeable (see the discussion in example (a)(1) above). He is not accountable for prior or subsequent shipments of marihuana imported by Defendants H or I because those acts were not in furtherance of his jointly undertaken criminal activity (the*

importation of the single shipment of marihuana).

(4) *Defendant K is a wholesale distributor of child pornography. Defendant L is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Similarly, Defendant M is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Defendants L and M are aware of each other's criminal activity but operate independently. Defendant N is Defendant K's assistant who recruits customers for Defendant K and frequently supervises the deliveries to Defendant K's customers. Each defendant is convicted of a count charging conspiracy to distribute child pornography. Defendant K is accountable under subsection (a)(1)(A) for the entire quantity of child pornography sold to Defendants L and M. Defendant N also is accountable for the entire quantity sold to those defendants under subsection (a)(1)(B) because the entire quantity was within the scope of his jointly undertaken criminal activity and reasonably foreseeable. Defendant L is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K because the scope of his jointly undertaken criminal activity is limited to that amount. For the same reason, Defendant M is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K.*

(5) *Defendant O knows about her boyfriend's ongoing drug-trafficking activity, but agrees to participate on only one occasion by making a delivery for him at his request when he was ill. Defendant O is accountable under subsection (a)(1)(A) for the drug quantity involved on that one occasion. Defendant O is not accountable for the other drug sales made by her boyfriend because those sales were not in furtherance of her jointly undertaken criminal activity (i.e., the one delivery).*

(6) *Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast, Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant Q is engaged in a jointly undertaken criminal activity and therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint undertaking with them because those sales were in furtherance of the jointly undertaken criminal activity and reasonably foreseeable in connection with that criminal activity.*

(7) *Defendant R recruits Defendant S to distribute 500 grams of cocaine. Defendant S knows that Defendant R is the prime figure in a conspiracy*

involved in importing much larger quantities of cocaine. As long as Defendant S's agreement and conduct is limited to the distribution of the 500 grams, Defendant S is accountable only for that 500 gram amount (under subsection (a)(1)(A)), rather than the much larger quantity imported by Defendant R.

(8) Defendant T, U, V, and W are hired by a supplier to backpack a quantity of marihuana across the border from Mexico into the United States. Defendants T, U, V, and W receive their individual shipments from the supplier at the same time and coordinate their importation efforts by walking across the border together for mutual assistance and protection. Each defendant is accountable for the aggregate quantity of marihuana transported by the four defendants. The four defendants engaged in a jointly undertaken criminal activity, the object of which was the importation of the four backpacks containing marihuana (subsection (a)(1)(B)), and aided and abetted each other's actions (subsection (a)(1)(A)) in carrying out the jointly undertaken criminal activity. In contrast, if Defendants T, U, V, and W were hired individually, transported their individual shipments at different times, and otherwise operated independently, each defendant would be accountable only for the quantity of marihuana he personally transported (subsection (a)(1)(A)). As this example illustrates, in cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the object of that jointly undertaken activity) may

depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities.

3. *"Offenses of a character for which §3D1.2(d) would require grouping of multiple counts," as used in subsection (a)(2), applies to offenses for which grouping of counts would be required under §3D1.2(d) had the defendant been convicted of multiple counts. Application of this provision does not require the defendant, in fact, to have been convicted of multiple counts. For example, where the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales. If the defendant is convicted of multiple counts for the above noted sales, the grouping rules of Chapter Three, Part D (Multiple Counts) provide that the counts are grouped together. Although Chapter Three, Part D (Multiple Counts) applies to multiple counts of conviction, it does not limit the scope of subsection (a)(2). Subsection (a)(2) merely incorporates by reference the types of offenses set forth in §3D1.2(d); thus, as discussed above, multiple counts of conviction are not required for subsection (a)(2) to apply.*

As noted above subsection (a)(2) applies to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, had the defendant been convicted of multiple counts. For example, the defendant sells 30 grams of cocaine (a violation of 21 U.S.C. § 841) on one occasion and, as part of the same course of conduct or common scheme or plan, attempts to sell an additional 15 grams of cocaine (a violation of 21 U.S.C. 846) on

another occasion. The defendant is convicted of one count charging the completed sale of 30 grams of cocaine. The two offenses (sale of cocaine and attempted sale of cocaine), although covered by difference statutory provisions, are of a character for which §3D1.2(d) would require the grouping of counts, had the defendant been convicted of both counts. Therefore, subsection (a)(2) applies and the total amount of cocaine (45 grams) involved is used to determine the offense level.

4. *"Harm" includes bodily injury, monetary loss, property damage and any resulting harm.*

5. *If the offense guideline includes creating a risk or danger of harm as a specific offense characteristic, whether that risk or danger was created is to be considered in determining the offense level. See, e.g., §2K1.4 (Arson; Property Damage by Use of Explosive); §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides). If, however, the guideline refers only to harm sustained (e.g., §2A2.2 (Aggravated Assault); §2B3.1 (Robbery)) or to actual, attempted or intended harm (e.g., §2F1.1 (Fraud and Deceit); §2X1.1 (Attempt, Solicitation, or Conspiracy)), the risk created enters into the determination of the offense level only insofar as it is incorporated into the base offense level. Unless clearly indicated by the guidelines, harm that is merely risked is not to be treated as the equivalent of harm that occurred. When not adequately taken into account by the applicable offense guideline, creation of a risk may provide a ground for imposing a sentence above the applicable guideline range. See generally §1B1.4 (Information to be Used in Imposing Sentence); §5K2.0 (Grounds for Departure). The extent to which harm that was attempted or intended enters into the determination of the offense level should be determined in accordance with §2X1.1 (Attempt, Solicitation, or Conspiracy) and the applicable offense guideline.*

6. *A particular guideline (in the base offense level or in a specific offense characteristic) may expressly direct that a particular factor be applied only if the defendant was convicted of a particular statute. For example, in §2S1.1, subsection (a)(1) applies if the defendant "is convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A)." Unless such an express direction is included, conviction under the statute is not required. Thus, use of a statutory reference to describe a particular set of circumstances does not require a conviction under the referenced statute. An example of this usage is found in §2A3.4(a)(2) ("if the offense was committed by the means set forth in 18 U.S.C. § 2242").*

   An express direction to apply a particular factor only if the defendant was convicted of a particular statute includes the determination of the offense level where the defendant was convicted of conspiracy, attempt, solicitation, aiding or abetting, accessory after the fact, or misprision of felony in respect to that particular statute. For example, §2S1.1(a)(1) (which is applicable only if the defendant is convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A)) would be applied in determining the offense level under §2X3.1 (Accessory After the Fact) where the defendant was convicted of accessory after the fact to a violation of 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A).

7. *In the case of a partially completed offense (e.g., an offense involving an attempted theft of $800,000 and a completed theft of $30,000), the offense level is to be determined in accordance with §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. See Application Note 4 in the Commentary to §2X1.1. Note, however, that Application Note 4 is not applicable where the offense level is determined under §2X1.1(c)(1).*

8. *For the purpose of subsection (a)(2), offense conduct associated with a sentence that was imposed prior to the acts or omissions constituting the instant federal offense (the offense of conviction) is not considered as part of the same course of conduct or common scheme or plan as the offense of conviction.*

Examples: (1) The defendant was convicted for the sale of cocaine and sentenced to state prison. Immediately upon release from prison, he again sold cocaine to the same person, using the same accomplices and modus operandi. The instant federal offense (the offense of conviction) charges this latter sale. In this example, the offense conduct relevant to the state prison sentence is considered as prior criminal history, not as part of the same course of conduct or common scheme or plan as the offense of conviction. The prior state prison sentence is counted under Chapter Four (Criminal History and Criminal Livelihood). (2) The defendant engaged in two cocaine sales constituting part of the same course of conduct or common scheme or plan. Subsequently, he is arrested by state authorities for the first sale and by federal authorities for the second sale. He is convicted in state court for the first sale and sentenced to imprisonment; he is then convicted in federal court for the second sale. In this case, the cocaine sales are not separated by an intervening sentence. Therefore, under subsection (a)(2), the cocaine sale associated with the state conviction is considered as relevant conduct to the instant federal offense. The state prison sentence for that sale is not counted as prior sentence; see §4A1.2(a)(1).

Note, however, in certain cases, offense conducted associated with a previously imposed sentence may be expressly charged in the offense of conviction. Unless otherwise provided, such conduct will be considered relevant conduct under subsection (a)(1), not (a)(2).

9. *"Common scheme or plan" and "same course of conduct" are two closely related concepts.*

(A) Common scheme or plan. For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi. For example, the conduct of five defendants who together defrauded a group of investors by computer manipulations that unlawfully transferred funds over an eighteen-month period would qualify as a common scheme or plan on the basis of any of the above listed factors; i.e., the commonality of victims (the same investors were defrauded on an ongoing basis), commonality of offenders (the conduct constituted an ongoing conspiracy), commonality of purpose (to defraud the group of investors), or similarity of modus operandi (the same or similar computer manipulations were used to execute the scheme).

(B) Same course of conduct. Offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as pat of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses. Factors that are appropriate to the determination of whether offenses are sufficiently connected or related to each other to be considered as part of the same course of conduct include the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses. When one of the above factors is absent a stronger presence of at least one of the other factors is required. For example, where the conduct alleged to be relevant is relatively remote to the offense of conviction, a stronger showing of similarity or regularity is necessary to compensate for the absence of temporal proximity. The nature

of the offenses may also be relevant consideration (e.g., a defendant's failure to file tax returns in three consecutive years appropriately would be considered as part of the same course of conduct because such returns are only required as yearly intervals).

10. *In the case of solicitation, misprision, or accessory after the fact, the conduct for which the defendant is accountable includes all conduct relevant to determining the offense level for the underlying offense that was known, or reasonably should have been known, by the defendant.*

Background: This section prescribes rules for determining the applicable guideline sentencing range, whereas §1B1.4 (Information to be Used in Imposing Sentence) governs the range of information that the court may consider in adjudging sentence once the guideline sentencing range has been determined. Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range. The range of information that may be considered at sentencing is broader than the range of information upon which the applicable sentencing range is determined.

Subsection (a) establishes a rule of construction by specifying, in the absence of more explicit instructions in the context of a specific guideline, the range of conduct that is relevant to determining the applicable offense level (except for the determination of the applicable offense guideline, which is governed by §1B1.2(a)). No such rule of construction is necessary with respect to Chapters Four and Five because the guidelines in those Chapters are explicit as to the specific factors to be considered.

Subsection (a)(2) provides for consideration of a broader range of conduct with respect to one class of offenses, primarily certain property, tax, fraud and drug offenses for which the guidelines depend substantially on quantity, than with respect to other offenses such as assault, robbery and burglary. The distinction is made on the basis of §3D1.2(d), which provides

for grouping together (i.e., treating as a single count) all counts charging offenses of a type covered by this subsection. However, the applicability of subsection (a)(2) does not depend upon whether multiple counts are alleged. Thus, in an embezzlement case, for example, embezzled funds that may not be specified in any count of conviction are nonetheless included in determining the offense level if they were part of the same course of conduct or part of the same scheme or plan as the count of conviction. Similarly, in a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction. On the other hand, in a robbery case in which the defendant robbed two banks, the amount of money taken in one robbery would not be taken into account in determining the guideline range for the other robbery, even if both robberies were part of a single course of conduct or the same scheme or plan. (This is true whether the defendant is convicted of one or both robberies.)

Subsections(a)(1) and (a)(2) adopt different rules because offenses of the character dealt with in subsection (a)(2) (i.e. to which §3D1.2(d) applies) often involve a pattern of misconduct that cannot readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing. For example, a pattern of embezzlement may consist of several acts of taking that cannot separately be identified, even though the overall conduct is clear. In addition, the distinctions that the law makes as to what constitutes separate counts or offenses often turn on technical elements that are not especially meaningful for purposes of sentencing. Thus, in a mail fraud case, the scheme is an element of the offense and each mailing may be the basis for a separate count; in an embezzlement case, each taking may provide a basis for a separate count. Another consideration is that in a pattern of small thefts, for example, it is important to take into account the full range of related conduct. Relying on the entire range of conduct, regardless of

the number of counts that are alleged or on which a conviction is obtained, appears to be the most reasonable approach to writing workable guidelines for these offenses. Conversely, when §3D1.2(d) does not apply, so that convictions on multiple counts are considered separately in determining the guideline sentencing range, the guidelines prohibit aggregation of quantities from other counts in order to prevent "double counting" of the conduct and harm from each count of conviction. Continuing offenses present similar practical problems. The reference to §3D1.2(d), which provides for grouping of multiple counts arising out of a continuing offense when the offense guideline takes the continuing nature into account, also prevents double counting.

Subsection (a)(4) requires consideration of any other information specified in the applicable guideline. For example, §2A1.4 (Involuntary Manslaughter) specifies consideration of the defendant's state of mind; §2K1.4 (Arson; Property Damage By Use of Explosives) specifies consideration of the risk of harm created.

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 3); November 1, 1989 (see Appendix C, amendments 76-78 and 303); November 1, 1990 (see Appendix C, amendment 309); November 1, 1991 (see Appendix C, amendment 389); November 1, 1992 (see Appendix C, amendment 439); November 1, 1994 (see Appendix C, amendment 503).

APPENDIX C

APPENDIX C

U.S.S.G. § 3D1.2

§3D1.2. Groups of Closely Related Counts

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped under this subsection:

§§2B1.1, 2B1.3, 2B4.1, 2B5.1, 2B5.3, 2B6.1;
§§2C1.1, 2C1.2, 2C1.7;
§§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;
§§2E4.1, 2E5.1;
§§2F1.1, 2F1.2;
§2K2.1;
§§2L1.1, 2L2.1;
§2N3.1;
§2Q2.1;
§2R1.1;
§§2S1.1, 2S1.2, 2S1.3;
§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.

Specifically excluded from the operation of this subsection are:

all offenses in Chapter Two, Part A;
§§2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3;
§2C1.5;
§§2D2.1, 2D2.2, 2D2.3;
§§2E1.3, 2E1.4, 2E2.1;
§§2G1.1, 2G1.2, 2G2.1;
§§2H1.1, 2H1.2, 2H1.3, 2H1.4, 2H2.1, 2H4.1;
§§2L2.2, 2L2.5;
§§2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.9;
§§2P1.1, 2P1.2, 2P1.3.

For multiple counts of offenses that are not listed, grouping under this subsection may or may not be appropriate; a case-by-case determination must be made based upon the facts of the case and the applicable guidelines (including specific offense characteristics and other adjustments) used to determine the offense level.

Exclusion of an offense from grouping under this subsection does not necessarily preclude grouping under another subsection.

Commentary

Application Notes:

1. *Subsections (a)-(d) set forth circumstances in which counts are to be grouped together into a single Group. Counts are to be grouped together into a single Group if any one or more of the subsections provide for such grouping. Counts for which the statute mandates imposition of a consecutive sentence are excepted from application of the multiple count rules. See §3D1.1(b).*

2. *The term "victim" is not intended to include indirect or secondary victims. Generally, there will be one person who is directly and most seriously affected by the offense and is therefore identifiable as the victim. For offenses in which there are no identifiable victims (e.g., drug or immigration offenses, where society at large is the victim), the "victim" for purposes of subsections (a) and (b) is the societal interest that is harmed. In such cases, the counts are grouped together when the societal interests that are harmed are closely related. Where one count, for example, involves unlawfully entering the United States and the other involves possession of fraudulent evidence of citizenship, the counts are grouped together because the societal interests harmed (the interests protected by laws governing immigration) are closely related. In contrast, where one count involves the sale of controlled substances and the other involves an immigration law violation, the counts are not grouped together because different societal interests are harmed. Ambiguities should be resolved in accordance with the purpose of this section as stated in the lead paragraph, i.e., to identify and group "counts involving substantially the same harm."*

3. *Under subsection (a), counts are to be grouped together when they represent essentially a single injury or are part of a single criminal episode or transaction involving the same victim.*

   When one count charges an attempt to commit an offense and the other charges the commission of that offense, or when one count charges an offense based on a general prohibition and the other charges violation of a specific prohibition encompassed in the general prohibition, the counts will be grouped together under subsection (a).

   Examples: (1) The defendant is convicted of forging and uttering the same check. The counts are to be grouped together. (2) The defendant is convicted of kidnapping and assaulting the victim during the course of the kidnapping. The counts are to be grouped together. (3) The defendant is convicted of bid rigging (an antitrust offense) and of mail fraud for signing and mailing a false statement that the bid was competitive. The counts are to be grouped together. (4) The defendant is convicted of two counts of assault on a federal officer for shooting at the same officer twice while attempting to prevent apprehension as part of a single criminal episode. The counts are to be grouped together. (5) The defendant is convicted of three counts of unlawfully bringing aliens into the United States, all counts arising out of a single incident. The three counts are to be grouped together. But: (6) The defendant is convicted of two counts of assault on a federal officer for shooting at the officer on two separate days. The counts are not to be grouped together.

4. *Subsection (b) provides that counts that are part of a single course of conduct with a single criminal objective and represent essentially one composite harm to the same victim are to be grouped together, even if they constitute legally distinct offenses occurring at different times. This provision does not authorize the grouping of offenses that cannot be considered to represent essentially one composite*

harm (e.g., robbery of the same victim on different occasions involves multiple, separate instances of fear and risk of harm, not one composite harm).

When one count charges a conspiracy or solicitation and the other charges a substantive offense that was the sole object of the conspiracy or solicitation, the counts will be grouped together under subsection (b).

Examples: (1) The defendant is convicted of one count of conspiracy to commit extortion and one count of extortion for the offense he conspired to commit. The counts are to be grouped together. (2) The defendant is convicted of two counts of mail fraud and one count of wire fraud, each in furtherance of a single fraudulent scheme. The counts are to be grouped together, even if the mailings and telephone call occurred on different days. (3) The defendant is convicted of one count of auto theft and one count of altering the vehicle identification number of the car he stole. The counts are to be grouped together. (4) The defendant is convicted of two counts of distributing a controlled substance, each count involving a separate sale of 10 grams of cocaine that is part of a common scheme or plan. In addition, a finding is made that there are two other sales, also part of the common scheme or plan, each involving 10 grams of cocaine. The total amount of all four sales (40 grams of cocaine) will be used to determine the offense level for each count under §1B1.3(a)(2). The two counts will then be grouped together under either this subsection or subsection (d) to avoid double counting. But: (5) The defendant is convicted of two counts of rape for raping the same person on different days. The counts are not to be grouped together.

5. *Subsection (c) provides that when conduct that represents a separate count, e.g., bodily injury or obstruction of justice, is also a specific offense characteristic in or other adjustment to another count, the count represented by that conduct is to be grouped with the count to which it*

constitutes an aggravating factor. This provision prevents "double counting" of offense behavior. Of course, this rule applies only if the offenses are closely related. It is not, for example, the intent of this rule that (assuming they could be joined together) a bank robbery on one occasion and an assault resulting in bodily injury on another occasion be grouped together. The bodily injury (the harm from the assault) would not be a specific offense characteristic to the robbery and would represent a different harm. On the other hand, use of a firearm in a bank robbery and unlawful possession of that firearm are sufficiently related to warrant grouping of counts under this subsection. Frequently, this provision will overlap subsection (a), at least with respect to specific offense characteristics. However, a count such as obstruction of justice, which represents a Chapter Three adjustment and involves a different harm or societal interest than the underlying offense, is covered by subsection (c) even though it is not covered by subsection (a).

Sometimes there may be several counts, each of which could be treated as an aggravating factor to another more serious count, but the guidelines for the more serious count provides an adjustment for only one occurrence of that factor. In such cases, only the count representing the most serious of those factors is to be grouped with the other count. For example, if in a robbery of a credit union on a military base the defendant is also convicted of assaulting two employees, one of whom is injured seriously, the assault with serious bodily injury would be grouped with the robbery count, while the remaining assault conviction would be treated separately.

A cross reference to another offense guideline does not constitute "a specific offense characteristic . . . or other adjustment" within the meaning of subsection (c). For example, the guideline for bribery of a public official contains a cross reference to the guideline for a conspiracy to

commit the offense that the bribe was to facilitate. Nonetheless, if the defendant were convicted of one count of securities fraud and one count of bribing a public official to facilitate the fraud, the two counts would not be grouped together by virtue of the cross reference. If, however, the bribe was given for the purpose of hampering a criminal investigation into the offense, it would constitute obstruction and under §3C1.1 would result in a 2-level enhancement to the offense level for the fraud. Under the latter circumstances, the counts would be grouped together.

6. *Subsection (d) likely will be used with the greatest frequency. It provides that most property crimes (except robbery, burglary, extortion and the like), drug offenses, firearms offenses, and other crimes where the guidelines are based primarily on quantity or contemplate continuing behavior are to be grouped together. The list of instances in which this subsection should be applied is not exhaustive. Note, however, that certain guidelines are specifically excluded from the operation of subsection (d).*

A conspiracy, attempt, or solicitation to commit an offense is covered under subsection (d) if the offense that is the object of the conspiracy, attempt, or solicitation is covered under subsection (d).

Counts involving offenses to which different offense guidelines apply are grouped together under subsection (d) if the offenses are of the same general type and otherwise meet the criteria for grouping under this subsection. In such cases, the offense guideline that results in the highest offense level is used; see §3D1.3(b). The "same general type" of offense is to be construed broadly, and would include, for example, larceny, embezzlement, forgery, and fraud.

Examples: (1) The defendant is convicted of five counts of embezzling money from a bank. The five counts are to be grouped together. (2) The defendant is convicted of two

counts of theft of social security checks and three counts of theft from the mail, each from a different victim. All five counts are to be grouped together. (3) The defendant is convicted of five counts of mail fraud and ten counts of wire fraud. Although the counts arise from various schemes, each involves a monetary objective. All fifteen counts are to be grouped together. (4) The defendant is convicted of three counts of unlicensed dealing in firearms. All three counts are to be grouped together. (5) The defendant is convicted of one count of selling heroin, one count of selling PCP, and one count of selling cocaine. The counts are to be grouped together. The Commentary to §2D1.1 provides rules for combining (adding) quantities of different drugs to determine a single combined offense level. (6) The defendant is convicted of three counts of tax evasion. The counts are to be grouped together. (7) The defendant is convicted of three counts of discharging toxic substances from a single facility. The counts are to be grouped together. (8) The defendant is convicted on two counts of check forgery and one count of uttering the first of the forged checks. All three counts are to be grouped together. Note, however, that the uttering count is first grouped with the first forgery count under subsection (a) of this guideline, so that the monetary amount of that check counts only once when the rule in §3D1.3(b) is applied. But: (9) The defendant is convicted of three counts of bank robbery. The counts are not to be grouped together, nor are the amounts of money involved to be added.

7. *A single case may result in application of several of the rules in this section. Thus, for example, example (8) in the discussion of subsection (d) involves an application of §3D1.2(a) followed by an application of §3D1.2(d). Note also that a Group may consist of a single count; conversely, all counts may form a single Group.*

8. *A defendant may be convicted of conspiring to commit several substantive offenses and also of committing one or*

more of the substantive offenses. In such cases, treat the conspiracy count as if it were several counts, each charging conspiracy to commit one of the substantive offenses. See §1B1.2(d) and accompanying commentary. Then apply the ordinary grouping rules to determine the combined offense level based upon the substantive counts of which the defendant is convicted and the various acts cited by the conspiracy count that would constitute behavior of a substantive nature. Example: The defendant is convicted of two counts: conspiring to commit offenses A, B, and C, and committing offense A. Treat this as if the defendant was convicted of (1) committing offense A; (2) conspiracy to commit offense A; (3) conspiracy to commit offense B; and (4) conspiracy to commit offense C. Count (1) and count (2) are grouped together under §3D1.2(b). Group the remaining counts, including the various acts cited by the conspiracy count that would constitute behavior of a substantive nature, according to the rules in this section.

Background: Ordinarily, the first step in determining the combined offense level in a case involving multiple counts is to identify those counts that are sufficiently related to be placed in the same Group of Closely Related Counts ("Group"). This section specifies four situations in which counts are to be grouped together. Although it appears last for conceptual reasons, subsection (d) probably will be used most frequently.

A primary consideration in this section is whether the offenses involve different victims. For example, a defendant may stab three prison guards in a singe escape attempt. Some would argue that all counts arising out of a single transaction or occurrence should be grouped together even when there are distinct victims. Although such a proposal was considered, it was rejected because it probably would require departure in many cases in order to capture adequately the criminal behavior. Cases involving injury to distinct victims are sufficiently comparable, whether or not the injuries are inflicted in distinct

transactions, so that each such count should be treated separately rather than grouped together. Counts involving different victims (or societal harms in the case of "victimless" crimes) are grouped together only as provided in subsection (c) or (d).

Even if counts involve a single victim, the decision as to whether to group them together may not always be clear cut. For example, how contemporaneous must two assaults on the same victim be in order to warrant grouping together as constituting a single transaction or occurrence? Existing case law may provide some guidance as to what constitutes distinct offenses, but such decisions often turn on the technical language of the statute and cannot be controlling. In interpreting this Part and resolving ambiguities, the court should look to the underlying policy of this Part as stated in the Introductory Commentary.

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 45); November 1, 1989 (see Appendix C, amendments 121, 253-256, and 303); November 1, 1990 (see Appendix C, amendments 309, 348, and 349); November 1, 1991 (see Appendix C, amendment 417); November 1, 1992 (see Appendix C, amendment 458); November 1, 1993 (see Appendix C, amendment 496).

APPENDIX D

APPENDIX D

U.S.S.G. § 5G1.3

§5G1.3. **Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment**

(a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.

(b) If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instance offense shall be imposed to run concurrently to the undischarged term of imprisonment.

(c) (Policy Statement) In any other case, the sentence for the instant offense shall be imposed to run consecutively to the prior undischarged term of imprisonment to the extent necessary to achieve a reasonable incremental punishment for the instant offense.

Commentary

Application Notes:

1. *Under subsection (a), the court shall impose a consecutive sentence where the instant offense (or any part thereof) was committed while the defendant was serving an undischarged term of imprisonment or after sentencing for, but before commencing service of, such term of imprisonment.*

2. *Subsection (b) (which may apply only if subsection (a) does not apply), addresses cases in which the conduct resulting in the undischarged term of imprisonment has been fully taken into account under §1B1.3 (Relevant Conduct) in determining the offense level for the instant offense. This can occur, for example, where a defendant is prosecuted in both federal and state court, or in two or more federal jurisdictions, for the same criminal conduct or for different criminal transactions that were part of the same course of conduct.*

   When a sentence is imposed pursuant to subsection (b), the court should adjust for any term of imprisonment already served as a result of the conduct taken into account in determining the sentence for the instant offense. Example: The defendant has been convicted of a federal offense charging the sale of 30 grams of cocaine. Under §1B1.3 (Relevant Conduct), the defendant is held accountable for the sale of an additional 15 grams of cocaine that is part of the same course of conduct for which the defendant has been convicted and sentenced in state court (the defendant received a nine-month sentence of imprisonment, of which he has served six months at the time of sentencing on the instant federal offense). The guideline range applicable to the defendant is 10-16 months (Chapter Two offense level of 14 for sale of 45 grams of cocaine; 2-level reduction for acceptance of responsibility; final offense level of 12; Criminal History Category I). The court determines that a sentence of 13 months provides the appropriate total punishment. Because the defendant has already served six

months on the related state charge, a sentence of seven months, imposed to run concurrently with the remainder of the defendant's state sentence, achieves this result. For clarity, the court should note on the Judgment in a Criminal Case Order that the sentence imposed is not a departure from the guidelines because the defendant has been credited for guideline purposes under §5G1.3(b) with six months served in state custody.

3. *Where the defendant is subject to an undischarged term of imprisonment in circumstances other than those set forth in subsections (a) or (b), subsection (c) applies and the court shall impose a consecutive sentence to the extent necessary to fashion a sentence resulting in a reasonable incremental punishment for the multiple offenses. In some circumstances, such incremental punishment can be achieved by the imposition of a sentence that is concurrent with the remainder of the unexpired term of imprisonment. In such cases, a consecutive sentence is not required. To the extent practicable, the court should consider a reasonable incremental penalty to be a sentence for the instant offense that results in a combined sentence of imprisonment that approximates the total punishment that would have been imposed under §5G1.2 (Sentencing on Multiple Counts of Conviction) had all of the offenses been federal offenses for which sentences were being imposed at the same time. It is recognized that this determination frequently will require an approximation. Where the defendant is serving a term of imprisonment for a state offense, the information available may permit only a rough estimate of the total punishment that would have been imposed under the guidelines. Where the offense resulting in the undischarged term of imprisonment is a federal offense for which a guideline determination has previously been made, the task will be somewhat more straightforward, although even in such cases a precise determination may not be possible.*

It is not intended that the above methodology be applied in a manner that unduly complicates or prolongs the sentencing process. Additionally, this methodology does not, itself, require the court to depart from the guideline range established for the instant federal offense. Rather, this methodology is meant to assist the court in determining the appropriate sentence (e.g., the appropriate point within the applicable guideline range, whether to order the sentence to run concurrently or consecutively to the undischarged term of imprisonment, or whether a departure is warranted). Generally, the court may achieve an appropriate sentence through its determination of an appropriate point within the applicable guideline range for the instant federal offense, combined with its determination of whether that sentence will run concurrently or consecutively to the undischarged term of imprisonment.

Illustrations of the Application of Subsection (c):

(A) The guideline range applicable to the instant federal offense is 24-30 months. The court determines that a total punishment of 36 months' imprisonment would appropriately reflect the instant federal offense and the offense resulting in the undischarged term of imprisonment. The undischarged term of imprisonment is an indeterminate sentence of imprisonment with a 60-month maximum. At the time of sentencing on the instant federal offense, the defendant has served ten months on the undischarged term of imprisonment. In this case, a sentence of 26 months' imprisonment to be served concurrently with the remainder of the undischarged term of imprisonment would (1) be within the guideline range for the instant federal offense, and (2) achieve an appropriate total punishment (36 months).

(B) The applicable guideline range for the instant federal offense is 24-30 months. The court determines that a

total punishment of 36 months' imprisonment would appropriately reflect the instant federal offense and the offense resulting in the undischarged term of imprisonment. The undischarged term of imprisonment is a six-month determinate sentence. At the time of sentencing on the instant federal offense, the defendant has served three months on the undischarged term of imprisonment. In this case, a sentence of 30 months' imprisonment to be served consecutively to the undischarged term of imprisonment would (1) be within the guideline range for the instant federal offense, and (2) achieve an appropriate total punishment (36 months).

(C) *The applicable guideline range for the instant federal offense is 24-30 months. The court determines that a total punishment of 60 months' imprisonment would appropriately reflect the instant federal offense and the offense resulting in the undischarged term of imprisonment. The undischarged term of imprisonment is a 12-month determinate sentence. In this case, a sentence of 30 months' imprisonment to be served consecutively to the undischarged term of imprisonment would be the greatest sentence imposable without departure for the instant federal offense.*

(D) *The applicable guideline range for the instant federal offense is 24-30 months. The court determines that a total punishment of 36 months' imprisonment would appropriately reflect the instant federal offense and the offense resulting in the undischarged term of imprisonment. The undischarged term of imprisonment is an indeterminate sentence with a 60-month maximum. At the time of sentencing on the instant federal offense, the defendant has served 22 months on the undischarged term of imprisonment. In this case, a sentence of 24 months to be served concurrently with the remainder of the undischarged term*

of imprisonment would be lowest sentence imposable without departure for the instant federal offense.

4. *If the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked, the sentence for the instant offense should be imposed to be served consecutively to the term imposed for the violation of probation, parole, or supervised release in order to provide an incremental penalty for the violation of probation, parole, or supervised release (in accord with the policy expressed in §§7B1.3 and 7B1.4).*

Background: This guideline provides direction to the court when a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment. See 18 U.S.C. § 3584. Except in the cases in which subsection (a) applies, this guideline is intended to result in an appropriate incremental punishment for the instant offense that most nearly approximates the sentence that would have been imposed had all the sentences been imposed at the same time.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 289); November 1, 1991 (see Appendix C, amendment 385); November 1, 1992 (see Appendix C, amendment 465); November 1, 1993 (see Appendix C, amendment 494).